S. HRG. 99-971

DEPARTMENT OF JUSTICE APPROPRIATION AUTHORIZATION ACT OF 1987

HEARING

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2376

A BILL TO AUTHORIZE APPROPRIATIONS FOR THE PURPOSE OF CARRYING OUT THE ACTIVITIES OF THE DEPARTMENT OF JUSTICE FOR FISCAL YEAR 1987, AND FOR OTHER PURPOSES

APRIL 29, 1986

Serial No. J-99-101

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

64-730 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-20

64-730 O - 87 - 1

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, JR., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, JR., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

DENNIS W. SHEDD, *Chief Counsel and Staff Director*
DIANA L. WATERMAN, *General Counsel*
MELINDA KOUTSOUMPAS, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

CONTENTS

OPENING STATEMENTS

	Page
Thurmond, Chairman Strom	1
Heflin, Senator Howell	53
Grassley, Senator Charles E	80

PROPOSED LEGISLATION

S. 2376—A bill to authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1987, and for other purposes 3

WITNESS

Meese, Hon. Edwin, III, Attorney General, U.S. Department of Justice 43

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Meese, Hon. Edwin, III:
- Testimony 43
- Prepared statement 81

APPENDIX

Responses of Hon. Edwin Meese, III, to written questions from:
- Chairman Strom Thurmond 91, 229
- Senator Charles Grassley 93
- Senator Dennis Deconcini 111
- Senator Charles McC. Mathias, Jr 139
- Senator Joseph R. Biden, Jr 239

DEPARTMENT OF JUSTICE APPROPRIATION AUTHORIZATION ACT OF 1987—S. 2376

TUESDAY, APRIL 29, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Denton, Simon, McConnell, Heflin, Laxalt, Specter, and DeConcini.

Staff present: Joseph Buzhardt, counsel; Mark Contreras, minority legislative assistant; Beverly McKittrick, counsel; Scott Green, minority professional staff member; and Edward Baxter, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

This morning, the committee will receive testimony on S. 2376, the Department of Justice Authorization Act for fiscal year 1987. I introduced this bill yesterday at the request of the administration.

In reviewing the legislation proposed by the administration and the statement submitted by Attorney General Meese, it is clear that the Department of Justice is involved in the process of re-evaluating priorities.

The great need for reduction in Federal budget deficits and the specific mandates of the Gramm-Rudman-Hollings deficit reduction law require that all Federal Government entities reevaluate priorities. I commend Attorney General Meese for his efforts in this regard.

The budget of the Department of Justice does not comprise a large percentage of the Federal budget. However, we must not lose sight of the fact that among the responsibilities of this Department are some of the most vital that are performed by the Federal Government. In seeking to ensure fiscal restraint, we must not compromise law enforcement functions which are vital to our Nation's well-being.

The administration's proposed budget for fiscal year 1987 includes requests for spending increases to provide for new Federal prison construction, stepped-up efforts to combat drug trafficking, improved automation to increase agency productivity, improved FBI counterintelligence capability, and improved defense of the United States in civil claims against it.

While I may not endorse each and every item in the administration's request, I do believe that this proposal generally recognizes and pursues the proper priorities for our Nation's law enforcement agency.

I look forward to working with my colleagues on this committee as we seek to make this the first Justice authorization passed by Congress in 7 years.

Before I call the witness I wish to place a copy of S. 2376 in the record.

[The text of S. 2376 follows:]

99TH CONGRESS
2D SESSION

S. 2376

To authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1987, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 28, 1986

Mr. THURMOND (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To authorize appropriations for the purpose of carrying out the activities of the Department of Justice for fiscal year 1987, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Department of Justice Appropriations Authorization Act, Fiscal Year 1987".

TITLE I—1987 FISCAL YEAR AUTHORIZATION

SEC. 2. There are authorized to be appropriated for the fiscal year ending September 30, 1987, to carry out the activities of the Department of Justice (including any bureau, office, board, division, commission, or subdivision thereof) the following sums:

(1) For General Administration: $73,708,000.

(2) For the United States Parole Commission: $10,420,000.

(3) For General Legal Activities, $584,009,000; which shall include—

(A) not to exceed $50,000 which may be transferred from the "Alien Property Funds, World War II," for the general administrative expenses of alien property activities;

(B) not to exceed $20,000 for unusual expenses necessary in the collection of evidence, to be expended under the direction of the Attorney General and accounted for solely on the certificate of the Attorney General or Deputy Attorney General; and

(C) not to exceed $6,000,000 of those funds appropriated for litigation-support contracts, which amount shall remain available until September 30, 1988;

(4) For the Foreign Claims Settlement Commission: $596,000;

(5) For the Antitrust Division: $50,009,000;

(6) For the United States Marshals Service: $176,759,000;

which shall include not to exceed $1,350,000 for planning, construction, renovation, maintenance, remodeling, and repair of buildings and the purchase of equipment incident thereto for protected witness safesites.

(7) For the Oversight of Bankruptcy Cases: $11,663,000

(8) For the Support of United States prisoners in non-Federal institutions: $54,180,000;

which amounts shall include sums available for reimbursements to appropriate health care providers for the care, diagnosis and treatment of United States prisoners and persons adjudicated in Federal courts as not guilty by reason of insanity: *Provided,* That such services shall be provided at rates that, in the aggregate, do not exceed the full cost of these services; and in addition $4,000,000 shall be available until expended under the Cooperative Agreement Program for the purpose of renovating, constructing, and equipping State and local correctional facilities.

(9) For Fees and Expenses of Witnesses: $34,676,000; which shall remain available until expended and which shall include such funds as may be made available under section 3525 of title 18, United States Code, for restitution or compensation for victims injured by protected witnesses: *Provided,* That restitution of not to exceed $25,000 shall be paid to the

estate of victims killed as a result of crimes committed by persons who have been enrolled in the Federal witness protection program, if such crimes were committed prior to October 12, 1984, and within two years after protection was terminated, notwithstanding any limitations contained in part (a) of section 3525 of title 18, United States Code.

(10) For the Community Relations Service: $32,009,000 of which $24,829,000 shall remain available until expended to make payments in advance for grants, contracts and reimbursable agreements and other expenses necessary under section 501(c) of the Refugee Education Assistance Act of 1980 (Public Law 96–422).

(11) For the Federal Bureau of Investigation: $1,278,410,000; which shall include—

(A) not to exceed $70,000 to meet unforeseen emergencies of a confidential character to be expended under the direction of the Attorney General and to be accounted for solely on the certificate of the Attorney General or Deputy Attorney General;

(B) not to exceed $3,000,000 of those funds appropriated for research relating to investigative

activities, which portion shall remain available until expended;

(C) not to exceed $10,000,000 of those funds appropriated for automated data processing and telecommunications and not to exceed $1,000,000 for undercover operations, which amounts shall remain available until September 30, 1988;

(D) not to exceed $15,000,000 of those funds appropriated for the expansion and renovation of the Bureau's New York field office, which amount shall remain available until expended; and

(E) not to exceed $45,000 for official receptions and representation expenses.

(12) For the Drug Enforcement Administration: $411,329,000; which shall include—

(A) not to exceed $70,000 to meet unforeseen emergencies of a confidential character to be expended under the direction of the Attorney General and to be accounted for solely on the certificate of the Attorney General or the Deputy Attorney General;

(B) not to exceed $1,200,000 of those funds appropriated for research, which amount shall remain available until expended; and

(C) not to exceed $1,700,000 of those funds appropriated for the purchase of evidence and for payments for information, which amount shall remain available until September 30, 1988.

(13) For the Immigration and Naturalization Service: $609,393,000; which shall include—

(A) not to exceed $50,000 to meet unforeseen emergencies of a confidential character to be expended under the direction of the Attorney General and to be accounted for solely on the certificate of the Attorney General or the Deputy Attorney General;

(B) not to exceed $400,000 of those funds appropriated for research, which amount shall remain available until expended; and

(C) not to exceed $425 per annum per employee for members of the Border Patrol and not to exceed $300 per annum per employee for Immigration Inspectors of the Immigration and Naturalization Service who are required by regulations or statute to wear a prescribed uniform in the performance of official duties.

(14) For the Federal Prison System, including the National Institute of Corrections: $767,454,000; which shall include—

(A) $598,807,000 for Salaries and Expenses;

(B) $9,495,000 of those funds appropriated for carrying out the provisions of sections 4351 thru 4353 of title 18, United States Code, which established a National Institute of Corrections; which amount shall remain available until expended;

(C) $159,152,000 of those funds appropriated for planning, acquisition of sites and construction of new facilities; and for the purchase and acquisition of facilities and remodeling and equipping of such facilities for penal and correctional institutions; and for the payment of United States prisoners for work performed in these activities; which amount shall remain available until expended; and

(D) not to exceed $300 per annum per employee for those employees of the Federal Prisons System who are required by regulation or statute to wear a prescribed uniform in the performance of official duties.

TITLE II—PERMANENT ENABLING LEGISLATION

SEC. 3. (a) Part II of Title 28, United States Code, is amended by inserting after chapter 37 the following new chapter:

"CHAPTER 38—GENERAL AUTHORIZATIONS—DEPARTMENT OF JUSTICE

"Sec.
"577. General authorizations.
"578. Authorizations and exemptions available for undercover investigative operations.

"§ 577. General authorizations—Department of Justice

"(a) The Attorney General or his designee is authorized to use Department of Justice appropriations to make payments for the conduct of the activities of the Department of Justice. Such payments may include payments for—

"(1) expenses, mileage, compensation, and per diem in lieu of subsistence, of witnesses as authorized by law: *Provided,* That no witness shall be paid more than one attendance fee for any one calendar day;

"(2) restitution or compensation pursuant to section 3525 of title 18, United States Code for victims injured by protected witnesses;

"(3) advances of public moneys under section 3324 of title 31, United States Code: *Provided,* That travel advances to law enforcement personnel engaged in undercover activity shall be deemed public monies within the meaning of section 3527 of title 31, United States Code;

"(4) planning, acquisition of sites and construction of new law enforcement facilities; and construction, operation, remodeling and repair of buildings and facilities

used for law enforcement purposes; and the purchase of necessary equipment and the payment of necessary expenses directly related to the conduct of these activities;

"(5) contracting with private organizations or entities for the safekeeping, care and subsistence of persons held under any legal authority;

"(6) the lease or purchase of passenger motor vehicles: *Provided,* That police type vehicles for law enforcement use may be purchased without regard to the general purchase price limitation for the fiscal year during which such a purchase is effected;

"(7) the purchase of firearms and ammunition for use by law enforcement officers and security personnel, and the participation in firearms competitions;

"(8) the purchase, lease, maintenance, and operation of aircraft for law enforcement purposes;

"(9) the lease of real property, including space in buildings, without disclosure of the Government's involvement: *Provided,* That any such lease and the nondisclosure of the Government's involvement are necessary for law enforcement or foreign counterintelligence purposes, other than for an undercover investigative operation: *Provided further,* That such authority may

be exercised only by those law enforcement bureaus listed in section 578(a) of title 28, United States Code;

"(10) miscellaneous and emergency expenses authorized or approved by either the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Administration;

"(11) official reception and representation expenses;

"(12) attendance at meetings;

"(13) services of experts and consultants as authorized by section 3109 of title 5, United States Code;

"(14) services of interpreters and translators who are not citizens of the United States;

"(15) payment of rewards, the purchase of evidence, and payment for information in connection with law enforcement;

"(16) the purchase of insurance for motor vehicles, boats, and aircraft operated in official Government business in foreign countries;

"(17) contracting with individuals for personal services abroad: *Provided,* That such individuals shall not be regarded as employees of the United States for

the purpose of any law administered by the Office of Personnel Management; and

"(18) benefits for employees serving overseas as authorized under section 901 (3), (5), (6A), (8), (9), and section 904 of the Foreign Service Act of 1980 (22 U.S.C. 4081 (3), (5), (6A), (8), (9), and 22 U.S.C. 4084), and under the regulations issued by the Secretary of State.

"(b) The Attorney General or his designee is authorized to collect fees from State, local, or private agencies or members of the public to defray all or part of the costs of any service, including training provided by the Federal Bureau of Investigation, the Drug Enforcement Administration, and the National Institute of Corrections, which the Department of Justice may provide to such agencies or individuals. Any fees collected shall be credited to the appropriation accounts used to pay the expenses incurred in providing the service and shall be available in those accounts only to the extent specified in appropriations acts.

"(c)(1) The Attorney General is authorized to accept and utilize, on behalf of the United States, any gift, donation, or bequest of real or personal property for the purpose of aiding or facilitating the work of the Department of Justice, including Federal Prison Industries, Incorporated. No gift may be accepted—

"(A) that attaches conditions inconsistent with applicable laws or regulations, or

"(B) that is conditioned upon or will require the expenditure of appropriated funds unless such expenditure has been authorized by Act of Congress.

"(2) The Attorney General shall promulgate rules for accepting gifts pursuant to this provision, to ensure, among other things, that no gifts are accepted under circumstances that will create a conflict of interest for the Department of Justice.

"(3) Gifts and bequests of money and the proceeds from sales of property received as gifts or bequests that were not immediately useable by the Department of Justice may be credited to any appropriation or fund and shall remain available until expended, upon order of the Attorney General.

"(4) Gifts, bequests of property, and property acquired from the proceeds credited to appropriations or funds pursuant to subsection (3), and which are no longer required by the Department of Justice for its needs and the discharge of its responsibilities, shall be reported to the Administrator of General Services for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

"(5) Property accepted pursuant to this section and the proceeds credited to appropriations of funds pursuant to sub-

section (3) shall be used as nearly as practicable in accordance with the terms of the gift or bequest.

"(6) For the purpose of Federal income, estate, and gift taxes, property accepted under subsection (a) of this section shall be considered as a gift or bequest to or for the use of the United States.

"(d)(1) The Attorney General or his designee is authorized to use appropriations for the Federal Bureau of Investigation to make payments for the conduct of its activities. Such payments may not be used to pay the compensation of any employee in the competitive service but may include payments for—

"(A) expenses necessary for the detection and prosecution of crimes against the United States;

"(B) protection of the person of the President of the United States and the person of the Attorney General;

"(C) investigations regarding official matters under the control of the Department of Justice and the Department of State, as may be directed by the Attorney General;

"(D) training in the United States and abroad for foreign law enforcement personnel, with the concurrence of the Secretary of State, as a counterpart to

similar training programs designed for State and local officers; and

"(E) acquisition, collection, classification and preservation of identification and other records and their exchange with, and for the official use of, the duly authorized officials of the Federal Government, of States, cities and other institutions, such exchange to be subject to cancellation if dissemination is made outside the receiving departments on related agencies.

"(2) The Federal Bureau of Investigation may establish and collect fees for the processing of noncriminal employment and licensing fingerprint cards. Such fees shall represent the full cost of furnishing the service. The funds collected shall be credited to the Salaries and Expenses, Federal Bureau of Investigation appropriation without regard to section 3302(b) of title 31, United States Code, and shall be available, only to the extent specified in appropriations acts, until expended, to pay for salaries and other expenses incurred in operating the FBI Identification Division. No fee shall be assessed in connection with the processing of requests for criminal history records by criminal justice agencies for criminal justice purposes or for employment in criminal justice agencies.

"(e) The Attorney General or his designee is authorized to use appropriations for the Drug Enforcement Administration to make payments for the conduct of its activities. Such

payments may include payments for expenses necessary for the detection and prosecution of crimes against the United States where such crimes arise from drug related activities, including but not limited to crimes enumerated in title 21 of the United States Code.

"(f) The Attorney General or his designee is authorized to use appropriations for the Immigration and Naturalization Service to make payments for the conduct of its activities. Such payments may include payments for—

"(1) distribution of citizenship textbooks to aliens without cost to such aliens;

"(2) allowances to aliens for work performed while held in custody under the immigration laws;

"(3) refunds of maintenance bills, immigration fines and other items properly returnable, except deposits of aliens who become public charges and deposits to secure payment of fines and passage money;

"(4) the lease of horses from officers or employees of the Service;

"(5) acquisition of land as sites for enforcement fences, and expenses incident to the construction of such fences; and

"(6) expenses and allowances incurred in tracking lost persons, as required by public exigencies, in aid of State or local law enforcement agencies.

"(g) The Attorney General or his designee is authorized to use appropriations for the Bureau of Prisons to make payments for the conduct of its activities. Such payments may include payments for—

"(1) the administration, operation, and maintenance of Federal penal and correctional institutions, including supervision and support of United States prisoners in non-Federal institutions; and for inmate legal services within the Federal prison system;

"(2) construction of buildings at prison camps and acquisition of land as authorized by section 4010 of title 18, United States Code;

"(3) the labor of the United States prisoners performed in the construction or remodeling of prison buildings or facilities; and

"(4) the purchase and exchange of farm products and livestock.

"(h) As used in this section the term 'law enforcement' refers to the activities of the Federal Bureau of Investigation; the Drug Enforcement Administration; the Immigration and Naturalization Service; the Bureau of Prisons; and the United States Marshals Service; except that for the purposes of subsection (a)(4), 'law enforcement' refers only to the activities, in the United States, of the Bureau of Prisons and, subject to the provisions of section 1252(c) of title 8, United

States Code, and section 4003 of title 18, United States Code, of the Immigration and Naturalization Service.

"§ 578. Authorizations and exemptions available for undercover investigative operations

"(a) Subject to the provisions of subsection (f) of this section, the authorizations and exemptions provided below may be utilized for undercover operations conducted by the following bureaus of the Department of Justice: The Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the United States Marshals Service. As used herein, the head of a bureau refers, respectively, to the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Commissioner of the Immigration and Naturalization Service and the Director of the United States Marshals Service.

"(b)(1) An exempt undercover operation refers to any operation designed and necessary to detect and prosecute crimes against the United States as to which the head of a bureau, or his designee, and the Attorney General, or his designee, have certified in writing that any action authorized by this section is necessary for the conduct of that undercover investigation: *Provided,* That as to undercover investigative operations of the Federal Bureau of Investigation any designee for the Director of the Federal Bureau of Investigation

and any designee for the Attorney General shall be a member of the Undercover Operations Review Committee.

"(2) An exempt undercover operation also refers to any operation of the Federal Bureau of Investigation designed and necessary to collect foreign intelligence or to conduct foreign counterintelligence, as to which the Director of the Federal Bureau of Investigation, or the Assistant Director of the Intelligence Division if so designated by the Director, and the Attorney General, or the Counsel for Intelligence Policy if so designated by the Attorney General, have certified in writing that any action authorized by this section is necessary for the conduct of that undercover investigation.

"(3) The type of exemptions sought for each operation shall be specified on the certification and the use of the exemptions for each operation will be reviewed during the operation by the official designated by of the head of the Bureau pursuant to subsection (b) (1) or (2) of this section.

"(c)(1) Appropriations may be used for purchasing or leasing property, buildings, facilities, space, goods, insurance, licenses, and any equipment necessary to establish and/or operate an undercover operation. These acquisitions shall be made in accordance with prevailing commercial practices so long as such practices are consistent with the purposes of the undercover operation. Laws applicable to Federal acquisitions, Federal property management, and Federal appropria-

tions shall not apply to any acquisition for an exempt undercover operation where compliance with such laws would risk compromise of the undercover nature of the investigation.

"(2) Appropriations may be used to establish, acquire and/or operate proprietary corporations or business entities in accordance with prevailing commercial practices so long as such practices are consistent with the purposes of the undercover operation. Laws applicable to Federal appropriations and Government corporations shall not apply to any transaction for an exempt undercover operation where compliance with such laws would risk compromise of the undercover nature of the investigation.

"(3) Appropriations and the proceeds from an exempt undercover operation may be deposited in banks or other financial institutions and may be used to offset necessary and reasonable expenses incurred in such operation without deposit in the Treasury: *Provided,* That, as soon as any such proceeds are no longer necessary for the conduct of such operation, such proceeds or the balance of such proceeds remaining at the time shall be deposited in the Treasury of the United States as miscellaneous receipts.

"(d) If a corporation or business entity established or acquired as part of an undercover operation under subparagraph (2) of paragraph (c) with a net value of over $150,000 is to be liquidated, sold, or otherwise disposed of, the head of

the bureau, as much in advance as he or his designee determines is practicable, shall report the circumstances to the Attorney General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as miscellaneous receipts.

"(e)(1) The Attorney General shall direct and supervise a detailed financial audit of each undercover investigative operation which is closed in fiscal year 1987, and each fiscal year thereafter, and shall, not later than one hundred and eighty days after such undercover operation is closed, submit a report to the Congress concerning such audit.

"(2) For purposes of these audit and reporting requirements:

"(A) The term 'closed' refers to the point in time at which—

"(i) all criminal proceedings (other than appeals) are concluded, or

"(ii) covert activities are concluded, whichever occurs later.

"(B) The terms 'undercover investigative operation' and 'undercover operation' mean any undercover investigative operation of a bureau (other than a foreign counterintelligence undercover investigative operation)—

"(i) in which—

"(a) the gross receipts (excluding interest earned) exceed $150,000, or

"(b) expenditures (other than expenditures for salaries of employees) exceed $150,000, and

"(ii) which is exempt from laws applicable to Federal appropriations and Government corporations.

"(f) The Commissioner of the Immigration and Naturalization Service, or his designee, and the Director of the United States Marshals Service, or his designee, shall include in the request for the Attorney General's certification required by subsection (b)(1) of this section: The expected time period for utilizing the exemptions, the expected resources to be committed, a description of the circumstances for using the exemptions, and a specification of the scope of the effort.".

(b) The Attorney General or his designee is authorized to use Department of Justice appropriations to make payments for assistance to individuals under section 501(c) of the Refugee Education Assistance Act of 1980 (Public Law 96–422) without regard to section 501(e)(2)(B) of that Act, which prohibits such assistance to individuals with respect to whom a final, nonappealable, and legally enforceable order of

deportation or exclusion has been entered. Such payments may include grants which shall be administered by the Community Relations Service.

(c) Section 4082(c) of title 18, United States Code (62 Stat. 850) is amended by striking the final words "as miscellaneous receipts" and inserting therefore the following: "to the credit of the appropriation available for such costs at the time such collections are made.".

(d) Section 6 of the Act of July 28, 1950 (64 Stat. 380; 8 U.S.C. 1555), is hereby repealed.

(e) Section 4043 of title 18, United States Code, and section 871(c) of title 21, United States Code, are hereby repealed.

SEC. 4. (a) Section 1501 of title 11, United States Code, and section 581(a) of title 28, United States Code, are amended, effective October 1, 1986, by adding the following two subsections:

"(11) Eastern District of Michigan.

"(12) Northern District of Ohio.".

(b) Section 408 of the Act of November 6, 1978 (Public Law 95–598, 92 Stat. 2549, 2686–87) is hereby repealed.

SEC. 5. Chapter 303 of title 18, United States Code, is amended by inserting after section 4043 the following new section:

"§ 4044. Authority to conduct autopsies

"A chief executive officer of a Federal penal or correctional facility may, pursuant to rules and regulations of the Director, order an autopsy and related scientific or medical tests to be performed on the body of a deceased inmate of the facility in the event of a homicide, suicide, fatal illness or accident, or unexplained death when it is determined that such autopsy or test is necessary to detect a crime, maintain discipline, protect the health or safety of other inmates, remedy official misconduct, or defend the United States or its employees from civil liability arising from the administration of the facility. To the extent consistent with the needs of the autopsy or of specific scientific or medical tests, provisions of local law protecting religious beliefs with respect to such autopsies shall be observed. Such officer may also order an autopsy or other post mortem operation, including removal of tissue for transplanting, to be performed on the body of a deceased inmate of the facility, with the written consent of a person authorized to permit such an autopsy or post mortem operation under the law of the State in which the facility is located.".

SEC. 6. Chapter 307 of title 18, United States Code, is amended as follows:

(a) the first paragraph of section 4121 is deleted and a new first paragraph is inserted as follows: " 'Federal Prison Industries', a government corporation of the District of Co-

lumbia, shall be administered by a board of six directors, appointed by the President to serve at the will of the President. Members of the board who are not employees of the Federal Government or the District of Columbia shall be paid for their services at the daily equivalent of the rate prescribed for GS–18 of the General Schedule in section 5332 of title 5, United States Code.".

(b) following section 4128 a new section is inserted as follows:

"§ 4129. General authorizations—Federal Prison Industries, Incorporated

"Federal Prison Industries, Incorporated, is authorized to make such expenditures and to make such contracts and commitments, without regard to fiscal year limitation, as may be necessary in carrying out the program set forth in the budget for the current fiscal year for such corporation, including purchase and hire of passenger motor vehicles.".

SEC. 7. Section 4204(b) of title 18, pertaining to the United States Parole Commission, is amended by adding at the end thereof the following new subsection:

"(a) The lease or purchase of passenger motor vehicles.".

SEC. 8. Chapter 401 of title 18, United States Code, is amended by deleting subsection (a) of section 5003 and inserting the following:

"(a) The Director of the Bureau of Prisons when proper and adequate facilities and personnel are available, is hereby authorized to contract with proper officials of a State, or territory, or Indian tribe, for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State, territory or tribe: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved; except that, where reimbursement from a State is not legally available, the contract shall provide for receiving in exchange persons convicted of criminal offenses in the courts of the United States, to serve their sentence in appropriate institutions or facilities of the State or territory by designation as provided in section 4082(b) of this title, this exchange to be made according to formulas or conditions which may be negotiated in the contract.".

SEC. 9. Section 263 of title 22, United States Code, is amended by inserting the following at the end thereof: "The Attorney General or his designee is also authorized to make payments from Department of Justice appropriations for expenses necessary to host, at intervals of ten years or longer, the annual meeting of the General Assembly of INTERPOL and to periodically sponsor INTERPOL conferences on topics of international crime.".

SEC. 10. Section 1622d of title 22, United States Code, pertaining to the Foreign Claims Settlement Commission, is amended by adding at the end thereof the following new paragraph:

"The Commission is authorized to hire passenger motor vehicles, for field use only, and to purchase insurance for official motor vehicles used abroad. The Commission may advance funds abroad and may advance funds to other government departments or agencies in connection with reimbursable agreements. The Commission is also authorized to employ aliens abroad and, with the approval of the Secretary of State, to acquire necessary office space and living quarters abroad and to maintain, repair, furnish and provide utilities for such properties.".

TITLE III—UNITED STATES MARSHALS SERVICE

SEC. 11. (a) Chapter 37 of title 28, United States Code, is amended such that sections 561, 562, 564, 565, and 566, shall read as follows:

"§ 561. United States Marshals Service

"(a) There is hereby established a United States Marshals Service as a bureau within the Department of Justice under the authority and direction of the Attorney General. The United States Marshals Service (hereinafter referred to in this chapter as the 'Service') shall be headed by a Director appointed by the Attorney General.

"(b) The Director of the United States Marshals Service (hereinafter referred to in this chapter as the 'Director') shall exercise the powers and duties set out in this chapter and such other powers and duties as may be vested in the Director pursuant to statute or delegation from the Attorney General.

"(c) The President shall appoint, by and with the advice and consent of the Senate, a United States marshal for each judicial district of the United States, except that any marshal appointed for the Northern Mariana Islands may at the time serve as marshal in another district. Each United States marshal shall be an official of the Service and shall serve under the direction and subject to the coordination of the Director.

"(d) Each marshal shall be appointed for a term of four years. On expiration of his term, unless he shall resign or be removed by the President, a marshal shall continue to perform the duties of his office until his successor is appointed and qualified or until a person is designated to act as marshal in accordance with section 562.

"(e) The Director shall designate places within a judicial district for the official station and offices of each marshal. Each marshal shall reside within the district for which he was appointed, except that—

"(1) the marshals for the District of Columbia and for the Southern District of New York may reside within twenty miles thereof; and

"(2) any marshal appointed for the Northern Mariana Islands who at the same time is serving in the same capacity in another district may reside in such other district.

"(f) The Director is authorized to select, appoint, employ, and fix compensation for deputy marshals and such officials and employees as shall be necessary to carry out the powers and duties of the Service and may designate such deputy marshals as law enforcement officers, in accordance with the policies and procedures he shall establish. Deputy marshals, officials, and employees are subject to disciplinary action, including removal, by the Director.

"(g) The Director shall supervise and direct the United States Marshals Service in the performance of its duties, including criminal investigations, and in accounting for public moneys. Each official of the Service shall report any official proceedings, receipts, and disbursements and the condition of the office under the purview of such official as the Director requires.

"(h) The Director may delegate to any other official of the Service the authority to carry out any function of the Director.

"(i) There is authorized to be appropriated such sums as are necessary to exercise the powers and duties of the United States Marshals Service.

"§ 562. Vacancies

"(a) In the case of a vacancy in the office of United States Marshal, the Attorney General may designate a person to perform the functions and act as marshal. The Attorney General shall not designate to act as marshal a person whose appointment by the President to that office the Senate has refused to give its advice and consent.

"(b) Such person designated by the Attorney General may serve until the earliest of the following events:

"(1) the entry into office of a United States marshal appointed by the President, pursuant to article II, section 2 of the Constitution;

"(2) the expiration of the thirtieth day following the end of the next session of the Senate; or

"(3) if such designee of the Attorney General is appointed by the President pursuant to section 561(c), said designee may serve until the expiration of the thirtieth day following the refusal of the Senate to give its advice and consent to the appointment by the President.

"§ 564. Powers as sheriff

"An official of the Service, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.

"§ 565. Expenses of United States Marshals Service

"The Service is authorized to—

"(a) establish procedures and to pay for—

"(1) the actual and necessary expenses associated with the offices established under section 561;

"(2) the expense of transporting prisoners, including the transporting between the United States and foreign countries of persons charged with crime, and including the cost of necessary guards and the travel and subsistence expenses of prisoners and guards;

"(3) the lease, acquisition, maintenance, and operation of aircraft and the lease and acquisition of law enforcement and passenger motor vehicles without regard to the general purchase price limitation for any current fiscal year and including the operation and maintenance for official use of vehicles seized and forfeited to the United States Government;

"(4) the purchase of firearms and ammunition and attendance at firearms matches and law enforcement competitions;

"(5) supervision of United States prisoners in non-Federal institutions;

"(6) payment of rewards and the purchase of evidence and payments for information;

"(7) other necessary expenditures as required by law; and

"(b) enter into contracts and cooperative agreements, as authorized by the Attorney General, including contracts for personal guard and other personal services, and may utilize such contracts for the service of government process in lieu of service by United States marshals or deputy marshals.

"§ 566. Powers and duties

"(a) The United States Marshals Service is authorized to provide for the safety and security of the Federal courts of the United States and provide other assistance in accordance with the policies established by the Attorney General.

"(b) Except as otherwise provided by law or the Federal Rules of Procedure, the United States Marshals Service shall execute all lawful writs, process and orders issued under the judicial authority of the United States, in accordance with the

policies established by the Attorney General, and shall command all necessary assistance to execute its duties.

"(c) The Director, United States Marshals, and other law enforcement officers of the United States Marshals Service may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

"(d) The United States Marshals Service is authorized to investigate fugitive matters, both domestic and foreign, as directed by the Attorney General.".

(b) Chapter 37 of Title 28, United States Code, is further amended—

(a) by repealing sections 567, 568, 569, and 570;

(b) by renumbering sections 571, 572, 573, 574, 575, and 576 to read 567, 568, 569, 570, 571, and 572, respectively; and

(c) by adding the following new section:

"§ 573. Authorization for certain witness security expenses

"The expenses incurred for the use of facilities in the protection of witnesses, and planning, acquisition, construction, renovation, maintenance, remodeling, and repair of

buildings and the purchase of equipment incident thereto for protected witness safesites shall be paid from appropriations available to the Marshals Service.".

(c) Chapter 123 of title 28, United States Code, is amended such that section 1921 shall read as follows:

"§ 1921. United States marshals' fees

"(a)(1) The United States marshals or deputies shall routinely collect, and a court may tax as costs, fees for the following:

"(A) serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process in any case or proceedings;

"(B) serving a subpoena or summons for a witness or appraiser;

"(C) forwarding any writ, order, or process to another judicial district for service;

"(D) the preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale;

"(E) the keeping of attached property (including boats, vessels, or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate including

overtime for each deputy marshal required for special services, such as guarding, inventorying, and moving;

"(F) copies of writs or other papers furnished at the request of any party;

"(G) necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service or endeavor; and

"(H) overtime expenses incurred by deputy marshals in the course of serving or executing civil process.

"(2) The marshals shall collect, in advance, a deposit to cover the initial expenses for special services required under subparagraph (E), and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded. This paragraph applies to all private litigants, including seamen proceeding pursuant to section 1916 of this title.

"(3) For purposes of subparagraph (G), if two or more services or endeavors, or if any endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding thereto any additional mileage trav-

eled in serving or endeavoring to serve in behalf of that party. If two or more writs of any kind, required to be served in behalf of the same party on the same person in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected.

"(b) The Attorney General shall from time to time prescribe by regulation the fees to be taxed and collected under subsection (a). Such fees shall be to the extent practicable, reflect the actual and reasonable cost of the service provided.

"(c)(1) The United States Marshals Service shall collect a commission of 3 per centum of the first $1,000 collected and 1½ per centum on the excess of any sum over $1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of the commission shall be within the range set by the Attorney General. If the property is not disposed of by marshal's sale, the commission shall be in such amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than the marshal or his deputy, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other part. This subsection applies to the judicially ordered sales and execution sales, without

regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law.

"(2) The Attorney General shall prescribe from time to time regulations which establish a minimum and maximum amount for the commission collected under paragraph (1).

"(d) The United States marshals may require a deposit to cover any of the fees and expenses prescribed under this section.

"(e) Without regard to the provisions of section 3302 of title 31, United States Code, the United States Marshals Service is authorized to credit amounts from fees and expenses collected (including amounts for overtime expenses) for the service of civil process, including complaints, summonses, subpoenas, and similar process and seizures, levies, and sales performed by the marshals to its current appropriation account (Salaries and Expenses, United States marshals) for the purpose, only, of carrying out those activities.".

(d) Chapter 301 of title 18, United States Code, is amended to add the following new section:

"§ 4002A. Support of United States prisoners in non-Federal institutions

"The Attorney General or his designee is authorized to make payments from appropriations available for the support of United States prisoners in non-Federal institutions for—

"(1) necessary clothing;

"(2) medical aid and necessary guard hire;

"(3) payment of rewards for assistance in the capture or information leading to the capture of a Federal fugitive; and

"(4) entering into contracts or cooperative agreements with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies, or materials required to establish acceptable conditions of confinement and detention services in any State or local government which agrees to provide guaranteed bed space for Federal detainees within that correctional system, in accordance with regulations issued by the Attorney General and which are comparable to the regulations issued under section 4006 of title 18, United States Code, except that amounts made available for this purpose shall not exceed the average per-inmate-cost of constructing similar confinement facilities for the Federal prison population; and, *Provided further,* That the availability of such federally assisted facility shall be assured for housing Federal prisoners and the per diem rate charged for housing such Federal prisoners shall not exceed allowable costs or other conditions specified in the contract or cooperative agreement.".

TITLE IV—PROGRAM REDUCTIONS AND TERMINATIONS

SEC. 12. (a) Section 1402(c)(1) of the Comprehensive Crime Control Act of 1984 (Public Law 98–473, 98 Stat. 2171; 42 U.S.C. 10601(c)(1)), is amended by deleting the period at the end thereof and adding the following: "; except that excess funds shall be deposited in the general fund of the Treasury if in fiscal year 1986 the Fund reaches the sum of $64,900,000 or if in fiscal years 1987 or 1988 the Fund reaches the sum of $35,000,000.".

(b) Section 517(b) of the Comprehensive Crime Control Act of 1984 (Public Law 98–473, 98 Stat. 2075; 21 U.S.C. 873(d)), is hereby repealed.

(c) Section 609 of the Comprehensive Crime Control Act of 1984 (Public Law 98–473, 98 Stat. 2088–90; 42 U.S.C. 3769 thru 3769d), is hereby repealed.

(d) Part A, sections 204–206, part B, sections 221–229, and part C, sections 241–249, of the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93–415, 88 Stat. 1109), as amended by the Comprehensive Crime Control Act of 1984 (Public Law 98–473, 98 Stat. 2108; 42 U.S.C. 5611), are hereby repealed.

(e) The following sections of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90–351), as amended or added by the Comprehensive Crime Control Act

of 1984 (Public Law 98–473, 98 Stat. 2080–2087), are hereby repealed: Sections 402 (1), (2), and (4); sections 403 through 408; and sections 501 through 506 (42 U.S.C. 3742 (1), (2), and (4); 42 U.S.C. 3743–3748; and 42 U.S.C. 3761–3766).

TITLE V—TABLES OF CHAPTERS AND SECTIONS

SEC. 13. The table of sections for chapter 301 of title 18, United States Code, is amended by inserting after the item relating to section 4002 the following new item:

"4002A. Support for United States prisoners in non-Federal institutions.".

SEC. 14. The table of sections for chapter 303 of title 18, United States Code, is amended by deleting the item relating to section 4043 and inserting the following new items:

"4043. Repealed.
"4044. Authority to conduct autopsies.".

SEC. 15. The table of sections for chapter 307 of title 18, United States Code, is amending by inserting after the item relating to section 4128 the following new item:

"4129. General authorizations—Federal Prison Industries, Incorporated.".

SEC. 16. The table of chapters for part II of title 28, United States Code, is amended by changing the item related to chapter 37 to read:

"37. United States Marshals Service ..... 561".

and by inserting after the item relating to chapter 37 and following new item:

"38. General authorizations ..... 577.".

SEC. 17. The table of sections for chapter 37 of title 28, United States Code, shall read as follows:

"561. United States Marshals Service.
"562. Vacancies.
"563. Oath of office.
"564. Powers as sheriff.
"565. Expenses of United States Marshals Service.
"566. Powers and duties.
"567. Disbursements of salaries and moneys.
"568. Collection of fees; accounting.
"569. Delivery of prisoners to successor.
"570. Delivery of unserved process to successor.
"571. Practice of law prohibited.
"572. Reemployment rights.
"573. Authorization for certain witness security expenses.".

SEC. 18. The table of sections for chapter 38 of title 28, United States Code, shall read as follows:

"577. General authorizations.
"578. Authorizations and exemptions available for undercover investigative operations.".

○

The CHAIRMAN. We are pleased to have with us today the able and distinguished Attorney General of the United States, Edwin Meese III. On behalf of the committee, I welcome him. We look forward to his presentation of the Department of Justice 1987 fiscal year budget request.

Mr. Meese, we are glad to have you.

Attorney General MEESE. Thank you very much, Mr. Chairman.

The CHAIRMAN. You may proceed now.

STATEMENT OF HON. EDWIN MEESE III, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Attorney General MEESE. I am pleased to be here today to discuss the 1987 budget request for the Department of Justice which you have very capably summarized, Mr. Chairman. This request reflects the law enforcement initiatives that President Reagan has maintained for our Department and for the Federal Government during the past 5 years.

These initiatives focus on supporting the core functions of the Federal Government and ensuring that these law enforcement responsibilities are aggressively and effectively implemented.

The budget provides for increases in those areas where the need for additional resources is urgent. It provides for significant selective reductions in order to accomplish the mandate of reducing the Federal deficit.

The President's budget clearly recognizes that Federal law enforcement functions must be maintained and strengthened, as you have suggested, Mr. Chairman. The fiscal year 1987 priorities will include confronting and attacking international and interstate drug trafficking and organized crime, exposing and stopping those who threaten the Nation's internal security, prosecuting the purveyors who violate our civil rights law, developing the Federal prison system to meet the expanding demands that are being placed on it, and representing the Federal Government in an ever-increasing range of litigation.

Our budget request for $4.3 billion and 64,415 permanent positions is designed to emphasize these core law enforcement responsibilities. Our positions, when compared to 1986, will grow by approximately 1,100, and our budget authority will increase proportionately.

As we maintain and strengthen our core law enforcement functions, we will undertake to reduce expenditures in other areas in order to accomplish another top priority of the President, and that is to reduce the deficit.

First, we will seek management improvements in our own program. Second, we will explore whether certain activities can be provided more effectively by the States or by private entities than by the Federal Government.

Third, we have identified certain services, such as training of State and local law enforcement personnel, where costs can be more equitably shared. Finally, we must confront the circumstance that some of the grant programs that have been in the Department for some time have outlived their mandates.

We must distinguish between programs that should be conducted at the national level and those that should be funded at the State or local level. We do not believe that a history of Federal assistance alone necessarily dictates further assistance. Indeed, we believe that Federal assistance has sometimes tended to perpetuate the least viable law enforcement programs.

Last year, the administration and Congress enacted a new drug initiative. Significant increases were provided to the Drug Enforcement Administration, the U.S. attorneys, and other agencies that are engaged in the war against drugs.

The 1987 budget request for DEA continues to reflect the President's deep concern that illegal drugs are the Nation's No. 1 threat to safety and stability. In 1986, the Congress approved $380 million for DEA. For fiscal year 1987, we recommend that this amount be raised to $411.3 million.

Program increases proposed include 138 positions and $10.1 million to expand our domestic investigations and improve the intelligence and laboratory services, 9 positions and $8.9 million to upgrade the automatic data processing and telecommunications function, and 9 positions and $9.1 million to purchase and maintain voice privacy radio equipment.

These and similar expenditures are critical to the integrity, safety and effectiveness of the investigations conducted by the Department's law enforcement agents.

While primary responsibility for enforcing the drug laws lies with DEA, this effort requires the resources and assistance of many other organizations. In October 1982, we undertook significant steps in this administration to make the Government's enforcement program more effective and efficient.

The Organized Crime Drug Enforcement task forces were launched at that time and have been remarkably effective in fostering interagency cooperation. The 1987 budget furthers this cooperative effort with requests to provide additional drug enforcement resources to the FBI, to the Marshals Service, to the U.S. attorneys, and to the Criminal and Tax Divisions of the Department.

Our ability to deal more effectively with all forms of crime, including drugs, will be enhanced by the new resources for the FBI. To counter the threat of foreign intelligence activities and meet the needs of other Federal investigative programs, we are requesting enhanced resources.

For foreign counterintelligence, we have increased our resources significantly for 4 successive years. We feel the direct result of this has been the uncovering of the espionage cases now going through our courts. We therefore request an increase based on our continuing concern about activities of foreign agents and their ability to obtain valuable information that pertains to our national security.

To assist the FBI, our request includes a challenging proposal to apply the techniques of artificial intelligence to investigations in such areas as narcotics, terrorism and organized crime, particularly labor rackateering. The cost of this program projected for 1987 is approximately $12 million.

We also are requesting voice privacy equipment for our FBI agents. As I stated earlier with regard to DEA, this is an important component of our communications system for the FBI, DEA, and

the Marshals Service. Therefore, we are asking for the voice privacy resources, and the FBI has been given the lead in developing this more secure radio system for all three of these investigative agencies.

A less dramatic but nevertheless critical need of the FBI is to strengthen the support services by some 469 positions and about $10 million. We have increased our agent personnel, we have increased our use of electronic surveillance and other specialized investigative techniques, and we need the clerical, typing and transcription support for these activities. Without these resources, cases cannot be effectively prepared for trial and investigations will be stalled or delayed.

The 1987 budget will bring the combination of FBI and DEA agent strength to new heights. This, together with the increased strength for the U.S. attorneys' offices, will place the Department of Justice in a much better position to investigate serious crime and bring more cases to trial.

Our success in developing more major cases with more defendants has posed some problems for our prisons. I would suggest, Mr. Chairman, that the Nation's commitment to fighting crime is reflected to some extent in the prison population.

Since 1981, the Federal prisoner population has increased 49 percent, and despite the extensive prison construction program in which we have been engaged, our prisons remain overcrowded.

In 1987, we plan to activate additional units in Alabama, Oklahoma, and Florida. With the construction request in the budget, we expect to be able to respond better to future needs. We are optimistic not just about the funding request, but because we have sites selected for three new Federal correctional institutions, with accompanying camps, at Bradford, PA; Marianna, FL; and Sheridan, OR.

For the first time in many years, we have been able to identify specific sites for the new facilities at the same time that we submit our requests in the budget. In addition, it should be noted that for 1987, the buildings and facilities request will allow us to add 250 cell spaces to existing facilities in Arizona and Illinois, as well as to conduct major renovations at existing institutions.

This budget also continues our funding for contracts with local jails to house Federal prisoners and maintains the cooperative agreement program which provides limited funding to renovate, construct and equip local jails so long as they guarantee spaces for Federal prisoners.

There are a number of other uses for automated data processing that are planned in the Department, including in the Federal prison system and DEA, for which we are requesting about $17 million to replace and upgrade ADP and telecommunications equipment.

We are also asking an additional $10 million to apply advanced office automation capabilities to our litigating components. This will allow the Department the means to coordinate its procurement strategy, ensure that the various divisions are compatible, and obtain the most efficient and effective systems for the overall Department.

Additionally, $4 million is requested to implement a new financial and administrative management information system which is necessary to ensure that our Department is able to comply with the accounting and financial standards that are imposed by law.

One other aspect of ADP has to do with moving forward with the Systematic Alien Verification and Entitlement Program in the Immigration and Naturalization Service. Although we are reexamining the overall ADP and telecommunications plan for that agency, we do believe that $1 million to expand the SAVE effort, as it is known, would allow us to exchange information with the various States to verify whether applicants for entitlements may, in fact, be ineligible because of their alien status. This will save money in the long run for States, as well as discouraging those illegal aliens who come into this country primarily for welfare benefits.

The Department's role in defending the United States and our Treasury in civil litigation has substantial financial impact and is an area where an investment in the budget will actually help to solve the problems of the deficit.

For 1987, we are requesting 114 new positions and approximately $5.8 million to help meet our growing responsibilities in this civil litigation area. The largest amount is for the defense of tort claims that involve asbestos and radioactive exposure, as well as contract claims.

We also are requesting increases for the Tax Division because of its increased burden involving appellate litigation and organized crime drug enforcement matters, and for the Land and Natural Resources Division which has extensive litigation to enforce the environmental laws and to defend the government in environmental actions. Litigation has increased in both of these areas.

And, of course, our U.S. attorneys, which have the primary responsibility for litigation, need more resources for both tort and contract work, again protecting the Treasury.

We have limited increases or changes in other programs. We propose to expand the U.S. Trustee Pilot Program in bankruptcy cases to two additional districts where the need has been demonstrated. We intend to submit legislation to the Congress to transfer to the Department of Justice some of the functions of the Interstate Commerce Commission, as that agency is being phased out as a separate unit of government.

The Antitrust Division budget reflects these anticipated additional responsibilities, and you will note that there is no funding being asked for the President's Commission on Organized Crime, inasmuch as they have completed their work during the current fiscal year.

The reductions that are reflected in the budget are also very important to implement. We are proposing, for example, to charge State and local trainees for costs incurred for travel, meals, and lodging. The costs of instruction itself and the other training expenses will continue to be borne by the various subdivisions of our Department.

Judging from the experience that we have had over the years at the Federal Law Enforcement Training Center at Glynco, GA, we think that State and local agencies will be willing to pay a greater share of the costs associated with this training.

The changes planned for the Office of Justice Programs within the Department are matters which have been discussed previously with the Congress. Our budget for 1987 contains no new funding for juvenile justice programs, the regional information sharing system, or the Mariel-Cuban grants.

We have consistently opposed new funding for these programs, although Congress did not act upon our proposal to rescind the 1986 funds in these programs. Our rescission request included the State and local assistance program, as well as changing the obligation limitations established on the crime victim fund.

On the latter program, the Comprehensive Crime Control Act of 1984 established a ceiling of $100 million to be spent annually for State, local, and Federal crime victim programs. The $35 million for 1987, we feel, is a significant Federal contribution toward these programs.

At the same time as we are reducing certain programs within the Office of Justice Programs, we will continue to provide a nationwide research and development capability through the National Institute for Justice and the Bureau of Justice Statistics. Both of these organizations are performing truly Federal functions that can be conducted only on the national level.

As a matter of fact, our budget request for 1987 includes for the Bureau of Justice Statistics an increase of $3 million to implement the first phase of the redesign of the uniform crime report, which is a major advance in Federal criminal statistics.

The administration's request also provides level funding for the Public Safety Officers Benefits Program and emergency assistance, as well as the Missing Children Program.

We have recently submitted a proposed authorization bill to the Congress. It reflects the needs that I have discussed to maintain and strengthen our law enforcement responsibilities, and we appreciate, Mr Chairman, your introducing that legislation.

The President's fiscal year 1987 budget addresses the obligation to reduce the deficit to the target level. In reaching this target, the administration determined to fund certain core functions that the Federal Government must perform. Our Department shares in those functions.

We urge the committee to join in this decisionmaking process and to concur in the resources that we have requested. We must avoid the narrow perspective, as proposed by the House Resolution 4356, freezing most of the Department of Justice appropriation categories at the fiscal year 1986 level.

We cannot abdicate our responsibility to see that the laws are effectively enforced in a fair and impartial manner.

With regard to House Resolution 4356, the bill, as introduced, provided, with limited exceptions, no acknowledgement of the increased resource needs of the Department of Justice. The failure to address particular needs departs from a rational budget process.

On the 22d of April of this year, the House Judiciary Committee reported H.R. 4356, with two amendments that provided increased funding levels for the Bureau of Prisons and U.S. attorneys. That measure is still approximately $124 million short of the funding levels which we see as absolutely necessary to maintain and

strengthen our law enforcement responsibilities, as directed by the President.

For example, the levels which H.R. 4356 would propose undercut the FBI's foreign counterintelligence efforts that are so important to our national security. Additionally, the U.S. Marshals Service has undertaken increased responsibilities as a result of recently enacted crime legislation. More warrant investigations most be undertaken and more prisoners, many of whom are violent, must be processed, confined and transported. Nor does H.R. 4356 recognize the increased responsibilities of the Marshals Service in the area of courthouse security. In an era where Government functions of all branches, including that of the Federal judiciary, are subjected to increasing dangers, we must be able to meet our responsibilities to ensure that the courts can carry out their functions in a secure environment. Furthermore, H.R. 4356 does not recognize the need of the Marshals Service to support the organized crime drug enforcement task forces.

Finally, it ignores the substantial exposure of the Treasury to the ever-increasing burden of lawsuits that are filed against the United States which seek monetary damages. We believe that it is a fundamental responsibility of the Department to defend these claims in order to protect the tax dollar, and that failure to provide the necessary resources will have a substantially negative impact on those efforts.

Mr. Chairman, our authorization bill also contains several substantive provisions. For example, we have proposed permanent undercover authority for our law enforcement bureaus. This authority has been revised to reflect more accurately the needs of undercover operations.

The bill also contains amendments concerning the Bureau of Prisons that allow for the exchange of prisoners with State institutions and for the conduct of autopsies when appropriate

Additionally, we have included a provision which gives specific authorization to the FBI to conduct law enforcement training in the United States and abroad for foreign law enforcement personnel.

Another provision which was previously submitted to Congress, contains our proposal that revises the laws that pertain to the U.S. Marshals Service and brings this statutory authority in line with current needs.

And, finally, our authorization proposal also differs significantly from those in the past in that it has a more functional structure and authorizes most categories on a permanent, rather than on an annual basis.

Before closing, I think it would be appropriate to say just a word about the Gramm-Rudman-Hollings sequester process for 1986. We anticipate resolution of the constitutional issues in the coming months by the Supreme Court. This litigation, however, must not divert us from our resolve to confront the deficit.

Because the district court's decision has been stayed and the legislation has established an alternate procedure for accomplishing the necessary reductions, our financial plans in the Department continue to anticipate a 4.3 percent reduction in 1986 budget authority.

We have been studying the programmatic impact of projected budget cuts by that sum, as well as any increased responsibilities that we must meet, and we are making plans now to ensure our ability to carry out the core Federal law enforcement program.

Our budget represents a balancing of the many interests that compete for Federal resources It candidly favors those areas that are essential elements in the enforcement of Federal law.

In an era that requires more than mere fiscal restraint, we must allocate resources only where the core functions are involved and where expenditures can be effectively utilized. To do otherwise, we feel, is to ignore our substantial responsibilities to the public, which needs the protection of both a strong Federal law enforcement effort and a fiscally sound budget.

I would like to thank you, Mr. Chairman, and the members of the committee for this opportunity to present the views of the Department of Justice, and I would be happy to respond if there are any questions from you or the others.

The CHAIRMAN. Thank you, Mr. Attorney General.

Mr. Attorney General, it is my understanding that the House Judiciary Committee recently reported H.R. 4356, its version of the Department of Justice authorization bill for fiscal year 1987.

I also understand from your testimony that the funding levels in the House committee bill are not in accord with the President's budget. Can you tell us what difficulties will arise for the Department of Justice if the Congress accepts the funding levels contained in H.R. 4356?

Attorney General MEESE. Mr. Chairman, those funding levels and the underfunding of the Department's litigating divisions, the FBI, the Marshals Service and most other components of the Department would have a serious and deleterious effect on the ability of the Department of Justice to carry out its basic core law enforcement functions and to protect the Federal Treasury from lawsuits seeking monetary damages.

The FBI's foreign counterintelligence efforts will be particularly undercut. The Marshals Service protection for members of the judiciary from retaliation by terrorists or violent criminals will be impaired.

Programs relating to organized crime involvement in drug trafficking will be underfunded, and our ability to litigate in defense of the United States will be eroded, despite the ever-increasing volume of damage suits and the awards that must be paid at taxpayer expense if we are not successful in that litigation.

In sum, Mr. Chairman, the funding cuts contained in the House committee bill are very troubling and we hope that this committee will chart a more responsible course.

The CHAIRMAN. As it has in the past, the administration is seeking to make permanent certain authorities which historically have been included in annual authorization legislation.

This committee has agreed that a number of authorizations, such as those relating to the purchase of vehicles and firearms, should be made permanent in order to eliminate the disruptive effects of their needless inclusion in annual authorizations. Does the House Judiciary Committee bill, H.R. 4356, include provisions to make these authorizations permanent?

Attorney General MEESE. No, Mr. Chairman, it does not, and that is why we believe that the approach taken in the bill which you introduced on behalf of the administration which is pending before this committee is more appropriate. It would still allow the Congress to focus its attention on both policy and oversight issues on an annual basis during the annual authorization process, but would not impose upon the committee the necessity of repeated reconsideration of what are largely routine issues.

So the permanent provision of some of these particular authorities would be a real assistance, we think, both to the Department and to the Congress.

The CHAIRMAN. Mr. Attorney General, the Department's bill contains a provision that would authorize the Federal Bureau of Investigation to provide training in the United States and abroad for foreign law enforcement personnel.

Would you please explain to the committee what activities would be conducted under this authority?

Attorney General MEESE. Mr. Chairman, for many years the FBI has invited foreign police officers to attend the FBI National Academy courses which are offered for State and local police officers.

Both Director Webster and I have recently had the opportunity to travel in the Asia area and we can see the importance of these courses in improving not only the law enforcement, but also improving the ability of the police agencies in those foreign countries to cooperate with our drug enforcement agents on stemming the flow of drugs into the United States

In addition, the Bureau conducts retraining courses for Academy alumni in the United States, and more recently retraining sessions have been conducted overseas for foreign police officers who are alumni of the Academy.

This is a very beneficial program. It has been undertaken because it ensures that the countries with whom we cooperate on criminal investigative matters will be schooled in the latest law enforcement techniques.

The foreign law enforcement training provision in our bill would make the Bureau's authority in this area explicit. I might say that in this day of terrorism, Mr. Chairman, this is particularly important that we have people that we know and can trust in the police agencies of foreign countries who will instantly respond when the FBI or other law enforcement agencies need their assistance in investigating terrorist incidents and pursuing terrorist suspects.

The training provision would also allow us, with the concurrence of the Secretary of State, to conduct similar training programs overseas. The State Department, the Organization of American States and the United Nations have all requested on occasion that we provide training in order to improve professionalism and respect for human rights within foreign police forces. This has been particularly true in Latin America.

So any such training programs conducted at the request of the State Department in these overseas activities would, of course, be funded under the Foreign Assistance Act of 1961, as amended.

The CHAIRMAN. Mr. Attorney General, the administration has requested that undercover authority for the Federal Bureau of Investigation and for the Drug Enforcement Administration be made a

permanent part of the United States Code rather than a part of the annual authorization process.

What problems have led the administration to make this request?

Attorney General MEESE. The problems primarily have been the fact that, often, authorization bills are not passed, or even appropriation bills are not always passed by the end of the fiscal year, and so the enactment of the new authorities may not be accomplished by the beginning of the next fiscal year. As a result, ongoing undercover operations may be interrupted due to this lapse. In addition to that, our bill refers to exemptions from laws pertaining to Federal acquisitions, Federal property management, Federal appropriations, Government corporations and banking.

The availability of exemptions from these various categories is important because of the near impossibility in predicting precisely what statutes will conflict with the legitimate needs of an undercover operation.

In this regard, I want to emphasize that the intent of these exemptions is to ensure that the enforcement efforts are conducted with strict attention to all applicable laws, and these exemptions are utilized only after thorough consideration at the highest levels of the Department—a regular review in which I participate personally.

This year, we have also requested that undercover authority be available for the Immigration and Naturalization Service and the Marshals Service, since these agencies conduct undercover operations and the availability of these exemptions will facilitate their activities, while, again, assuring that they are conducted with scrupulous attention to all laws.

Obviously, the provision of undercover authority on a permanent basis does not in any way interfere with the ability of this committee and other appropriate committees to look into the undercover activities and to request and receive information from the Department on the guidelines which have been put down by the Attorney General in the past and which are kept up to date so that we have undercover investigations carefully managed, supervised, and which are conducted in concurrence with all appropriate safeguards.

The CHAIRMAN. Mr. Attorney General, the Department's proposed bill authorizes exchange of prisoners between the Federal prison system and State and local prison systems. Can you explain the need for this authority?

Attorney General MEESE. Mr. Chairman, it occasionally is beneficial to both State and local government on the one hand and the Federal system on the other that we take State and local prisoners into our system either temporarily or, in some cases, on a long-term basis.

But the present law provides that we must be reimbursed for the full cost of their confinement, with which we agree. However, there are some cases where the States are unable to make cash reimbursements, and in those cases, where appropriate, we feel it would be helpful to allow the State authorities to accept Federal prisoners, and therefore provide the reimbursement in kind, if you will,

for your acceptance of State prisoners. We think that this would benefit both levels of government.

The CHAIRMAN. Mr. Attorney General, what impact, if any, has the 4.3-percent reduction in 1986 budget authority under Gramm-Rudman-Hollings had on the Department's programs?

Attorney General MEESE. Well, as I mentioned in my opening remarks, Mr. Chairman, we are now reviewing the programmatic impacts of that cut. We find that the effects of Gramm-Rudman-Hollings cuts for fiscal year 1986, coupled with a substantial workload increase, create concern about our ability to continue with the funds presently available. This is a matter that we have been discussing with the Office of Management and Budget, and there is a general recognition of the particular difficulties caused by the workload increases.

We are focusing on several particular areas of responsibility which have increased during fiscal year 1986 to an extent not anticipated at the time that the budget provisions for this year were adopted.

For example, more resources are necessary for the adequate housing, feeding, and care for the dramatically growing population in our Federal prison system. Now, there is no question in my mind that the growth of the Federal prison system has reaped tremendous benefits and saved countless amounts of dollars for the American people and for governments at all levels. But in this particular account, it does show a substantial source of possible underfunding.

The growth of approximately 4,000 additional Federal prisoners is a result of our increased enforcement activities, and also the Department's agreement to accept a significant number of the District of Columbia prisoner population.

Moreover, we have the continued detention of the Mariel Cubans, which has added significant demands on our resources, including the strain on the detention facilities of the Immigration and Naturalization Service.

In addition, as I explained earlier, the Marshals Service has assumed additional obligations under the Comprehensive Crime Control Act of 1984, and also has added responsiblities for courthouse security.

Finally, in proposing options for dealing with these or other potential shortfalls that we might experience in fiscal year 1986, we will, of course, seek, to the greatest extent possible, to make such options deficit-neutral by finding offsetting savings in other parts of the budget.

The CHAIRMAN. Mr. Attorney General, as you stated in your testimony, the administration has consistently recommended termination of the Juvenile Justice Program. However, Congress has just as consistently been unwilling to accept this recommendation.

Do you see any room for a compromise solution to this issue, which is becoming an annual debate?

Attorney General MEESE. Well, Mr. Chairman, we would be happy, of course, to work with the committee to see if something cannot be worked out in this regard. Frankly, from our standpoint, it is simply a matter of priorities.

We feel that we are contributing more to the juvenile justice problem in our country by utilizing our resources for priority programs like interdicting the supply of drugs into the country and the investigation and prosecution of major drug traffickers within the United States, than having a compilation of small funding programs, many of which have not been particularly useful under the Office of Juvenile Justice and Delinquency Prevention. But in this area, we would be happy to work with the Committee to see what might be done in terms of working out a compromise.

The CHAIRMAN. Mr. Attorney General, the administration has also again recommended deletion of all funding for the Regional Information Sharing System. I continue to hear from those who believe that this program plays a vital role in State and local law enforcement efforts.

What is your assessment of the value of this program to law enforcement efforts at the State and local level, and how will this termination affect those efforts?

Attorney General MEESE. Mr. Chairman, we have received information from some local and State law enforcement officials that this program is valuable and does provide assistance to them. We do not disagree with the program itself.

However, the original intention of the Federal Government was to provide seed money for this program many years ago, and that the program then would be carried on, if it was successful, by contributions from the States themselves.

We have more than reached the point where the Federal responsibility for this program should be terminated. To whatever extent it is necessary in a particular region, the States should put up the necessary support funds since the benefit flows entirely to the State governments.

The CHAIRMAN. The distinguished Senator from Alabama, Mr. Heflin.

Senator HEFLIN. I have an opening statement that I ask be made part of the record.

The CHAIRMAN. Without objection, that will be done.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

We are pleased to have Attorney General Meese testify before us today on the Department of Justice's 1987 budget request.

The Department of Justice deserves credit for the progress it has made in fighting crime throughout the United States. That fight must remain as a top priority even though we will be forced to conduct it with reduced funds in the next few years.

I am especially pleased to see that the war on drugs remains the Department's number one priority. I have been working closely with Attorney General Meese to keep the pressure on drug traffickers, especially as Federal anti-drug efforts in Florida have shifted large amounts of drug smuggling to the Mobile corridor. I note that the Department is requesting increased funding and positions for the Drug Enforcement Administration, and I wholeheartedly concur with this recommendation.

Our national attention has increasingly focused on the threat of foreign intelligence agents operating in the United States. We need to strengthen our defenses against espionage, particularly with new and ever-increasing terrorist threats to our security within our borders.

Given the importance of these efforts, budget cuts in the Department of Justice are difficult to make. I am deeply concerned and disturbed by the Department's decision to seek the elimination of three programs, the Office of Juvenile Justice and Delinquency Prevention, the Bureau of Justice Assistance, and the Regional Infor-

mation Sharing System, rather than make the across-the-board cuts that Gramm-Rudman-Hollings requires. Cuts should be made fairly and not disproportionately target programs of proven effectiveness. Assistance for our law enforcement agencies fighting an ever-rising tide of violent crime, and programs to provide a safety net for abused, forgotten and delinquent children have never been more desperately needed.

The Office of Juvenile Justice and Delinquency Prevention funds vitally needed programs, including rehabilitation of youthful offenders, drug abuse prevention, child safety, foster care, child abuse prevention, runaway shelters, assistance for homeless children, prevention of child pornography, and delinquency research. OJJDP funds a variety of programs in my home state of Alabama, including a fine program to fight child abuse in Huntsville. This program now serves as a model that has inspired similar programs in other cities throughout the nation. If the Justice Department succeeds in eliminating the OJJDP program, Alabama will lose three quarters of a million dollars in essential funding for programs like these. Because a freeze of funding was carried out in mid-December, Alabama has already been forced to borrow money to keep its juvenile justice programs going.

The Bureau of Justice Assistance has continued the excellent work of the Law Enforcement Assistance Administration in funding important crime prevention programs. Elimination of the program will severely damage the growing partnership between Federal, State, and local criminal justice systems. The Bureau of Justice Assistance conducts research into all aspects of the criminal justice system for the benefit of the entire nation. Sometimes the benefits of preventative programs are hard to measure, and they certainly don't attract a lot of public attention. If basic research programs in crime prevention are discontinued, however, the American people will feel the pinch.

The Regional Information Sharing System Program provides an essential link between Federal, State, and local authorities by enabling them to work together on multi-jurisdictional investigations, specialized surveillance, investigative equipment sharing, and other activities. The value of this program can best be understood by considering the difficulty that a small sheriff's department has in keeping up with the latest information, sharing what they have learned, and, as is becoming increasingly necessary, coordinating their activities with other law enforcement agencies across the country. The guile and sophistication of criminals is increasing, and the bulk of law enforcement falls on our state and local authorities. They need our help more than ever.

I look forward to working with you, Mr. Meese, and the Justice Department to find alternatives to eliminating these vital programs.

Senator HEFLIN. I am, of course, concerned with particular areas. I notice that the Department is requesting increasing funding and an increasing number of positions for the Drug Enforcement Administration, and I wholeheartedly concur with this request.

Do you judge that the request the Department is making in this area will be adequate to improve the enforcement of drug laws?

Attorney General MEESE. Senator, we feel that in light of the various constraints on the budget, the request that we are making is very appropriate and it will continue the effort of the last 5 years to increase the resources of the Federal Government into this effort. We think that this is the appropriate amount that should be requested.

Senator HEFLIN. Well, I noticed you qualified your statement with the words "of constraints placed on the budget." I think that the drug problem in this country is sufficiently serious that it should be given a top priority.

We are faced with Gramm-Rudman and deficit reductions but there are certain priority programs that, in my judgment, Government should give priority to, and the drug problem is one of them.

Another priority, in my judgment, is the threat of foreign intelligence agents operating in the United States. It seems to me that we need to strengthen our defenses against espionage, particularly

with the new and ever-increasing terrorist threats to national security within our borders.

It may well be that some sort of joint effort with the Department of Defense intelligence agency—is there currently a cooperative effort going on now between the Department of Defense's intelligence agency and the Department of Justice's investigative agencies concerning this matter?

Attorney General MEESE. Yes, there is, Senator. We have very close cooperation among all of the intelligence community. We have increased that cooperation and coordination by developing a very close working relationship, even to the point of my frequent meetings with the Director of Central Intelligence and with the Secretary of Defense, so that we can, together, work on the problems of foreign counterintelligence and protecting national security.

I might also say that I appreciate your comments in regard to priorities because in both the areas of narcotics and foreign counterintelligence, this budget makes those top priorities and increases the resources to a level that we think is adequate.

If, at any point, the particular circumstances require additional resources, with the permission of the President I would certainly come back and discuss it with this committee.

Senator HEFLIN. I would like to ask you this, and I realize that you are restrained by classified information, but I wonder if you can give us any information on the dangers of Libyans in this country? Can you tell us whether or not there is an effort being made to identify Libyans in the United States and whether or not they might be classified as dangerous, and as to whether or not any steps have been taken relative to the potential of Quaddafi agents or Libyans that might come out of Nicaragua, where I understand there is quite a large concentration, of Libyans?

Do you have any information on these matters that you can give us without violating any classified information?

Attorney General MEESE. Senator, I can say that in regard to potential terrorists of all sorts, whatever their origin, we have a very effective program, we feel, in the FBI to locate and take necessary steps for surveillance.

We are reviewing the whole Libyan situation, about the presence of Libyans in the country, with the INS and the FBI currently as a counterpart to the actions being taken by allied governments in Europe.

Also, since the Berlin discotheque bombing, we have placed INS and other resources of the FBI on particular alert for the kind of infiltration of suspected or possible terrorists from other countries.

Senator HEFLIN. Of course, there are other matters in which I am interested. The chairman mentioned the Juvenile Justice and Delinquency Program, which for years has been an excellent program, the Bureau of Justice Assistance and the Regional Information Sharing System, which I mentioned in my statement that is part of the record.

I hope that as you evaluate these matters that their importance will be given adequate consideration.

That is all, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Mr. Chairman, I do not have an opening statement, but am looking forward to the testimony of Mr. Meese.

The CHAIRMAN. Thank you, Senator McConnell.

Senator MCCONNELL. Mr. Attorney General, I do not have any questions for you, just an observation. Following up on what the chairman asked you about OJJDP, I have only been here 2 years, but I understand that prior to my arrival every year we went through this ritual of attempting to delete all of the funds for OJJDP. It never happens and never will happen, in my judgment.

I am wondering if it might not be better next year, rather than alarm absolutely everybody in that community from top to bottom in this country that all of us end up hearing from who have been active in that field—I am wondering if we might consider not doing that next year, because it is not going to happen; you know it and I know it.

It sure does create an awful lot of alarm to activists in the fields of programs for young people across America. I wonder if you have any observation.

Attorney General MEESE. Senator, unfortunately, a lot of these organizations that do the writing are organizations that would not exist without the Federal funds and that have really, in the long run, very little to do with the reduction of juvenile crime or the prevention of juvenile delinquency.

A lot of them are lobbying organizations, a lot of them are public relations organizations, and I think the amount of funding that really seeped down to actual operational programs on the local level has been relatively small compared to these huge organizations that have grown up since this act was passed in 1974. So I think that when I mentioned to the chairman that we would be glad to work with the committee to perhaps try to work out some compromise in this annual debate that you referred to, I would certainly want to do that.

But I am not impressed by the amount of paperwork that goes into the annual flurry of effort on the part of some of these organizations. It seems to me that we really should study what level ought to fund juvenile justice programs. I suspect that the programs that are really valuable, that really have something to do with preventing delinquency and improving general juvenile justice, are going to be funded at the State and local levels.

Senator MCCONNELL. At the risk of being argumentative, after 7 years running a local government in which we had both secure and nonsecure detention programs for children and a variety of different innovative grants from OJJDP, I simply disagree with you, which is not to say that there was not some money wasted. I am sure that is true everywhere in the Federal Government.

My question really was not whether you think some of the money is not appropriately spent. My question really is what is the point in going through the exercise, because we are not going to abolish OJJDP. I mean, it is obvious we are not going to do that, and it seems to me that it unnecessarily irritates an awful lot of people who, in my judgment, are not necessarily ripping off the Federal Government and really are making a contribution in the field of combatting juvenile delinquency.

Attorney General MEESE. Well, I certainly do not want to be misunderstood as labeling all the people who write as ripping off the Federal Government, because it is not true. A lot of the money has been well spent.

As a matter of fact, the original goals have been substantially met. We have spent something like $800 million for the purposes that you mentioned, to take status offenders, as they are known, out of criminal detention facilities and to accomplish a lot of the other goals.

I think it is really a question of priorities as to where we ought to put the limited Federal funds and at what level a lot of essentially local functions ought to be funded. That is why I think the Federal Government has done its share.

I do think, as I think you would agree in a review of the programs, there have been some funds that have not been used as well as others, but that the Federal responsibility in this field is best met by concentrating on truly Federal functions, such as the drug enforcement function and the other kinds of things which have to be done at a national level, rather than things that can be and should be funded at a local level.

But as I say, this is something that I would be very happy to sit down with you and other members of the committee and see if we cannot work out a better way than the annual tug-of-war.

Senator MCCONNELL. Thank you, sir.

No further observations, Mr. Chairman.

The CHAIRMAN. The distinguished ranking member, Senator Biden.

Senator BIDEN. I yield to my colleague from Illinois.

The CHAIRMAN. The distinguished Senator from Illinois, Mr. Simon.

Senator SIMON. I thank you, Mr Chairman, and I thank my colleague from Delaware.

General, first, I want to commend you for recusing yourself on the Deaver matter, and to commend Mr. Deaver for requesting special counsel. I would hope that could be handled as expeditiously as possible, in everyone's best interest.

Any comment you would care to make on that, I would appreciate.

Attorney General MEESE. Well, I appreciate your comments, Senator, and I can assure you that this matter will be handled in the most expeditious manner possible.

Senator SIMON. Have you had a chance to look at the bill that Senator Thurmond, the chairman of the committee, has introduced in this general area?

Attorney General MEESE. I have not personally looked at it, but others in the Department are analyzing it at the present time and will be prepared to give their views, I believe, at a hearing that is coming up very shortly

Senator SIMON. Shifting to another area, judicial nominations, I have concern on two fronts: One, the amount of partisanship in the nominees, and, second, the area of quality.

In the President's first term, 100 percent of his U.S. court of appeals nominees were Republican—higher than any recent Presi-

dent. One bar journal says higher than any President since Woodrow Wilson.

In the district court nominees for the first term—and I realize this is before you were Attorney General—it was 96 percent, compared to President Ford's, for example, 78 percent.

In the area of quality, since I have been on this committee 50 percent of the U.S. court of appeals nominees have received the lowest possible approval rating from the American Bar Association. Of that bottom 50 percent, three-fourths received votes of not qualified from a minority.

Do you have any general comments, and is it possible to instruct your staff to look a little more carefully at how you are approaching this whole question of judicial nominations?

Attorney General MEESE. Senator, I want to assure you and the members of the committee that probably this administration has taken more care and put more effort into the appointment of judicial candidates than any administration in recent years, and the quality has never been higher.

If you go out and talk to people who are out in the field—judges, lawyers and others—you will find that the President is regularly commended for the high quality of his judicial appointments. The President's record continues what he did in California when he was Governor, where he is known by both Democrats and Republicans as appointing the best judges in the history of the State. So I do not think there is any problem with quality.

The American Bar Association rating is a view of particular judges. It is often biased in certain ways. For example, on the circuit court, generally the ABA committee does not give very high ratings to people who have not been trial lawyers. But our experience has found that, for appellate courts, law professors and those with extensive experience which may not have been in the courtroom but in legal researching and writing have comparable experience. It turns out that when they get on the bench, this is reflected in the comments and responses of the lawyers who practice before them and the other judges on the court.

In terms of partisanship, we certainly have not tried to be partisan. I might make the facetious observation that maybe all the Democrats had been appointed by President Reagan's predecessor. His predecessor had an unusual number of appointments during his 4-year term because of the various laws which did not go into effect until that year.

But, actually, we have been very careful, I think, to try to find the best possible judges, most of whom are recommended to us, with the exception of the circuit court judges. Certainly, in the case of the district court judges, they are all recommended to us by Members of the Senate.

Senator SIMON. If I could just respond briefly, when you say the quality was never higher, I am getting an awful lot of messages to the contrary. I received a letter from a Federal judge yesterday saying he is very much concerned about what has happened.

I have been meeting with representatives of various bar groups who are concerned. I am getting a different message than the one you are receiving.

As far as the partisanship I recognize, that under a Republican administration, your party will, understandably, predominante. But 100 percent is an extreme record on the court of appeals; you cannot get any higher than that.

In the district court, 96 percent is, again, much higher than it has been, though I recognize that Senators play a large role there.

Just two or three other questions. One is——

Attorney General MEESE. Could I just intervene to say that if there is a concern by a Federal judge, I would be certainly very much interested in finding out who that is and what the basis is for the concern.

Senator SIMON. I am not sure he would want to identify himself, but I think the concern is genuine. I might add that not only have I received this one letter, but I met informally with three Federal judges who expressed the same concern.

On another matter, Polish citizens who came here after the imposition of martial law face a situation where they have to appear every 6 months to renew their status here. This policy leaves almost 7,000 people in limbo.

After the Cuban missile crisis, we adjusted all Cubans in the country to permanent resident status. We go through this automatically. I would appreciate having the Justice Department look at this to see if we could not grant the same right to Polish citizens.

Attorney General MEESE. Senator, this is a matter of great concern to me. I met with a number of the Polish groups and officials of their organizations. We have some asylum regulations that are now pending and we are looking at this situation, and we certainly will examine this very thoroughly.

Senator SIMON. I thank you very much for that.

I was handed a statement that on February 25, you agreed with Secretary Shultz that we should change the immigration laws so that people are not refused the right to enter this country because they happen to differ with administration's policy or policies of this Government.

I have introduced a bill on this matter. It seems to me that your statement of February 25, which I would like to enter in the record, and the statement of Secretary Shultz are both sound.

We simply embarrass ourselves needlessly by saying that Allende's widow cannot come in, or someone else's widow, or someone else with views that are not popular here cannot come in.

I do not know if you care to comment on that.

Attorney General MEESE. Well, I would be happy to look at your bill, Senator, but I do share Secretary Shultz 'view in this. Often, we give more publicity to a person of very limited qualifications simply by refusing them the opportunity to come into the country.

Senator SIMON. I could not agree more.

Then, finally, I would ask you your views in an area where I do not have any solid answers. That is the problem of the Cubans who are incarcerated.

Do you have any good, quick solutions for us here?

Attorney General MEESE. Well, again, Senator, I was going to facetiously say if you have any good solutions, we would welcome them, also.

Senator SIMON. I do not have any.

Attorney General MEESE. I just want to tell you that we absolutely share your concern about this problem. We are doing some things now. We are currently in discussions with the Department of State to try to develop a strategy which will enable us to get back to what we had going for a short period of time; that is, we had normalized immigration processes as far as the reception of Cuban citizens here, and they, in turn, were taking back some of the Mariel boatlift people. I am hopeful that in some way we can restore that process, but I am absolutely in agreement with you on the difficulties inherent in this problem, and can assure you of our best efforts to try to solve it, although it is a very difficult and complex problem.

Senator SIMON. It is a tough one.

Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The able ranking member of the committee, Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

General, I apologize for being late. Senators Roth, Specter, and I were sitting on the Amtrak train, which, I want to point out for the record, is hardly ever late and should continue to be funded, but it was late this morning by 35 minutes.

We all three kidded that the reason it was late was because President Ford was riding down from Philadelphia to Wilmington to make a speech, and I think that is where it got stuck. But I apologize.

I would like to follow up on the judicial nomination process. It is my understanding that you have received stated concerns from my Republican colleagues in various States about the way in which appointments are proceeding.

It was characterized to me by my colleagues that it is a slightly different method that is being pursued under your direction compared to that of your predecessor. I am referring to the way in which Senators are able to put forward their nominees for consideration.

Can you explain to us if there has been any change in the method by which the Senators from the States affected make their recommendations for consideration of judges or U.S. attorneys?

Attorney General MEESE. Well, I cannot talk about administrations prior to 1981, Senator, but there has been no change whatsoever in the process that is used by the Department of Justice and the White House during the time that I have been in the Justice Department as opposed to the time my predecessor, William French Smith, was there.

I participated in both processes; in one, as a member of the White House review board; in this current year and few months, as the Attorney General. And I have seen no difference in the process whatsoever.

Senator BIDEN. How do you explain, then, again, for the record, the abnormally high number of minority reports of unqualified for the various judicial nominees that have come up?

Mr. Meese, by the time the President is out of office, he will have had the opportunity and the honor of appointing more than half the members of the Federal judiciary. There are only 735 and he

will have appointed—because of a coincidence of legislation increasing the number of judges and turnovers, he will have appointed somewhere in excess of 450, if I am not mistaken.

There has, in fact, been a higher number of nominees rated as not qualified or given the minimal rating of qualified.

How do you explain that?

Attorney General MEESE. Well, first of all, we——

The CHAIRMAN. Excuse me just a minute.

Senator Biden, I have another committee meeting going on and I am going to ask the distinguished Senator from Nevada if he will take over.

Senator BIDEN. It is always a pleasure to be with President Laxalt. I am delighted. [Laughter.]

You all think I am kidding. I am not.

Attorney General MEESE. Senator, I would like to see the statistics because, first of all, we have never submitted anyone that I know of for nomination who has been rated not qualified.

Senator BIDEN. No; excuse me. To make it clear, minority views.

Attorney General MEESE. You sometimes have minority reports. I would be interested in looking at the statistics because I doubt if there has been any real difference. There may have been some—we are talking about a very small number of people.

Even though, in the aggregate, over 8 years it might be a lot of people, we are talking about very small statistical measurements. But I would be interested in looking at that. I know of no reason for it because we have used the uniformly high standards that President Reagan has always insisted upon for judges.

As I explained to Senator Simon, sometimes on the courts of appeals or even for trial courts where we have sought people who have not, particularly in courts of appeals, had extensive trial practices, there is sometimes reflected a particular bias by the ABA committee.

Frankly, we have not been totally satisfied with the ABA system, and I have had discussions with the ABA leaders on how they might improve their evaluation system, because we have noticed some biases of various sorts creep into that process which we have been seeking to remove

Senator BIDEN. It would be useful to the committee, to the extent you would be willing to share with us the nature of the bias that you believe exists in the ABA process, because obviously although none of us are bound, nor should be bound in this advise and consent capacity, by the ABA recommendation, historically it has been given significant weight for decades through Democratic and Republican administrations.

I sometimes have great difficulty with the ABA. I had difficulty with them back in the early 1970's and mid-1970's when they found it very difficult to find anywhere out there a woman or a black—apparently, the same difficulty you are having—who are qualified to be judges.

Percentagewise, it was staggering, the few people that the ABA in the early 1970's was willing to acknowledge were qualified. They argued then that it was a matter of trial experience, a matter of tenure before the bar, and the like.

64-730 O - 87 - 3

So I agree with you that the ABA should not be the controlling element of determination of whether one is qualified or not. So to the extent that you could provide for the committee your recommendations to the ABA as to where bias is incorporated, it would be helpful to us in making a judgment about how much weight we should place on the ABA recommendation.

By the way, before too much time passes, I have been receiving, as they use the vernacular, a little bit of heat, something that neither of us are unaccustomed to, but I want to publicly compliment the Justice Department on the way in which you have proceeded to handle a very delicate and, I guess, some would argue, politically damaging case that I think is going to come out in the wash the right way, and that is the way you have handled the Presser matter.

The Presser case was rife with possibilities of political expediency. And I contacted Justice and you made available to me the man whom I have great respect for, the Director of the FBI, who shared with Professor Blakey, special counsel of the staff, and I all the information relating to that.

I publicly concluded that the decision you made was an accurate one and that you are continuing to pursue it. I am anxious for the public to learn, when time permits, the detail and extent to which you are pursuing all matters relating to not only Mr. Presser, but the cases surrounding him.

And I want you to know you continue to have my support in that process, because you have handled it, I think, with dispatch and you have handled it well.

With regard to State and local assistance of the criminal justice system, one of the things—we have this battle every year and I will not prolong it. I would only associate myself, with the Senator from Kentucky, on this matter.

It might be a good idea not to spend a lot of time going through this every year, because I hope you will not succeed in your suggestion, but one of the things you said in response to him was that you think basically the Juvenile Justice Act has accomplished its purpose with regard to status offenders.

But the Juvenile Justice Act is not a static act. The notion, the philosophy behind it is not static, and we amended the act at your suggestion and the suggestion of others, the whole category of violent juvenile offenders. A great deal more has to be done there—a great deal more than we are now doing.

I just do not want to leave the impression that it is a static measure, any more than the crime statistics. I mean, the last 4 years, the administration takes credit for the drop in the crime rate. I assume you are here to claim credit for the rise in the crime rate today.

We all know that you as Attorney General have little to do with it going down.

Now, this year the crime rate is up 4 percent, according to the FBI. I do not hold anybody responsible for it, but I offer it only as evidence of the fact that there is a lot more work to be done. And in the juvenile justice area, I would hope you would not view it, as seems to be the administration's propensity in this area, as a static issue, a static document.

Senator BIDEN. But I would ask for you to consider the notion that it is not, you know, a static document and that changes are taking place and innovation has to continue.

Attorney General MEESE. Senator, we certainly agree, and that is the reason that we have included juvenile justice matters as a part of the innovative activities of the National Institute of Justice, which is the primary research and development arm of the Department.

I have no quarrel whatsoever with your statement that juvenile crime is a continuing problem; indeed, it is. It is really a question of where, in an era of limited resources, we put our money and what other resources are available to handle this problem.

I met yesterday, for example, with a group of State legislators and I talked with them about the importance of this matter being addressed at the State and local level.

As I said in response to earlier questions, with limited resources, I think we can do much more in the Federal Government handling problems that are truly Federal. I think there is no question that we need to do the national things in juvenile justice—the collection of statistics, the providing of information, the research that needs to be done on a national basis, all of which can be done by the National Institute of Justice and the Bureau of Justice Statistics.

The moneys that we have, limited as they are, are much better invested in the interdiction of drugs into the United States, the investigation and prosecution of major traffickers, the assistance to local people who are working on the drug program, and the programs that we have working with juveniles where we used forfeited assets through local police departments for drug education programs.

So by no means are we abdicating in any way our role in the juvenile crime field. It is merely a matter of how we approach it and which funds are used for what purpose.

I will be happy to answer your questions.

Senator BIDEN. Let me move to the Organized Crime Commission. As I understand it, we are at some point fairly soon going to have a final printed version of the final report on the Organized Crime Commission.

We invested about 3 years and $5 million in this effort. I am hopeful that something useful is going to come out of the recommendations, not that I agree with all of them; certainly, in my view, not the universal drug testing.

But let me ask you this: I am concerned with what the Commission seemed not to do. It did not conduct an independent review of the operations of the Department of Justice or attempt to develop for us a strategy or blueprint for organized crime control, including drugs.

All administrations, including this one, seem to follow, although you have done better, in my view, than any other administration, a sort of body-count strategy.

Do you have any plans to set up an advisory committee to do that portion of the work that the Crime Commission either did not have an opportunity to do or chose not to address, such as the two things that I have suggested, and do we not have to spend a little

more time thinking through how to curtail the money flow from major syndicates?

I notice, for example, that the Crime Commission praises you for your civil RICO suit against the Teamsters in northern New Jersey. Do you plan on using civil RICO more or less, and how are we going on this thinking of a better way to equip the Justice Department to deal with the new emerging crime organizations that you have talked about in the past?

Attorney General MEESE. Senator, we have ongoing programs in the field of organized crime, particularly in the drug field. The FBI has developed some major new strategies which they have briefed me on within the course of the last year, in response to our mandate to do a better job of getting at major crime organizations.

I have no plans for another advisory committee. I think the Organized Crime Commission was given a free hand to look wherever they thought that they ought to be looking. We do not know of anything that they neglected that would be beneficial or that could be served by an advisory committee.

I point to my management of the Department, the management team that we have put together, and the regular supervision that we have of the various efforts—we have, on a weekly basis, a review of what is going on in the FBI and the DEA. I spend several hours a week on this because it is a matter of major concern to us.

I think that that serves to do what you are talking about. It is the responsibility of the Department's executive staff to make sure that this is going on. Judge Webster and I have spent a great deal of time on it, along with others in the Department.

But we are developing new strategies. We are constantly reviewing what has gone right and what has gone wrong, how we can do a better job not only through the Department, but also through the National Drug Enforcement Policy Board, which, as you and I have discussed on occasion in the past, I think is becoming increasingly an important part of the ability to coordinate and martial all the resources of the Federal Government in this matter of drug enforcement.

Senator BIDEN. I have some questions about that, but I yield to my colleague, and in the next round we will talk about the Drug Enforcement Policy Board

Senator LAXALT (presiding). We have a vote, as the Senator may or may not have realized. Why do you not continue questioning until we hit the five bells?

Senator Specter, General, wants to ask you some questions and he will be here shortly after voting himself.

Why do you not continue, Senator Biden?

Senator BIDEN. Thank you

Well, speaking of the board, the board has been under some criticism for producing, the allegation is, little in its first year of operation. The same Organized Crime Commission report on drugs in America of March 1986 stated, and I quote, "The performance of the board to date has been somewhat ambiguous. The board has yet to assert a clear leadership role."

Have you had a chance to review this report and consider the recommendations that the Commission has made with regard to the board, and if so, can you tell me what your comment is?

Attorney General MEESE. Well, I have a task force presently reviewing the report. As you pointed out, there are a limited number of copies available, since they are done on a Xerox machine. There will be more copies when we get the printed report.

I have reviewed it briefly, and I have a task force which is looking into it in detail. I think that the characterization of the results of the National Drug Enforcement Policy Board as being ambiguous is not an accurate one.

I think the board has certainly done a lot in the first year. I think we had a lot going already in terms of coordination, but we have brought together all of the coordinating mechanisms of the Federal Government into a single entity.

We have had the board meeting in person, with the principals participating on a regular basis. It has led to a number of recommendations on how the drug enforcement strategy should be carried out. It has included some specific suggestions on differences in the way equipment was financed, as well as in a general approach to the overall problems of both interdiction and investigation and prosecution.

For the first time, there has been a composite look at the resources being put by the Federal Government into drug enforcement—the various budgets.

Senator BIDEN. If I could stop you there on the budget issue, did the board develop and agree on a Federal narcotics control budget for fiscal 1987? Did the board make specific recommendations of what the fiscal priorities should be?

Attorney General MEESE. We did, to a limited extent. We did the first cut at it and I think made some important recommendations, particularly items that should go into the budget and items that should not go into the budget.

We analyzed the various proportions of the budget that were going for interdiction and for investigation and prosecution. In fact, from the board's general review of this have come some of the suggestions for increases in the budget of the Drug Enforcement Administration which are included in the 1987 authorization and appropriations bill.

Senator BIDEN. For us to get an assessment on how much detail, how deeply involved the board gets in this, can you tell me whether or not the board thought that the cuts in Customs and IRS in this year's budget were appropriate in the overall strategy and context of the narcotics program? Did they actually comment on that, look at it?

Attorney General MEESE. Yes; we did comment on that. We noted that Customs which has a number of responsibilities had major increases in resources over the past several years, and we looked at the point to be sure that this would not materially decrease Customs' involvement in enforcement activity and their participation in the interdiction effort.

Senator BIDEN. The reason I ask is, for example—this is somewhat topical—our vote, which has, I guess, about 5 minutes left, is a vote asking for us to cut foreign aid in order to increase Customs moneys because of the concern for the cut in the number of Customs agents.

So here we are on the Hill voting today whether or not we are going to cut foreign aid in order to increase the ability to impact on interdiction. I guess I had better go cast that vote.

Senator LAXALT. Is the General prepared to give us any guidance on this vote?

Attorney General MEESE. I am sure that the representatives of the administration have given you their position on this particular measure. We feel, quite frankly, that Customs has received considerable increases in past years, much more so perhaps than in some of the other areas.

While you can always use more, and I am sure they would feel that way, I think we would be supportive of the President's budget as it went forward.

Senator LAXALT. General, will you excuse us for a moment or two? Senator Specter will be back momentarily and he will have some questions.

Senator Biden, have you concluded your questioning?

Senator BIDEN. No; I have some more questions.

Senator LAXALT. Very well.

We will stand in recess for a moment.

[A brief recess was taken.]

Senator SPECTER [presiding]. We will now reconvene the hearing. Senator Laxalt has gone to vote, but has asked that I proceed until he returns, which should be shortly.

Mr. Meese, I would like to pick up on a line of questioning that Senator Biden initiated. I had to leave before he had finished his questions concerning the Office of Juvenile Justice and Delinquency Prevention, so I do not know precisely where he ended up. As you know, I had to go to the floor to vote.

You commented before that you felt that resources had to be martialed to take care of what were really Federal problems. But the debate goes on and on as to what really is a Federal problem; we all have different perspectives on it.

As far as the Office of Juvenile Justice and Delinquency Prevention is concerned, the administration has had a consistent position since President Reagan took office in 1981, when I became the chairman of the Juvenile Justice Subcommittee.

There has been a consistent conclusion by the Congress that the funding for the Office of Juvenile Justice and Delinquency Prevention is a Federal responsibility, as the Congress defines it.

I took this subject up with you during your confirmation hearings and you responded—and I have the exact text here, but I do not think it is necessary to refer to it—that you would be interested in continuing the program as long as it was the congressional will to do so.

There have been many problems with the administration of the Office of Juvenile Justice and Delinquency Prevention occasioned by cuts which have come from the Justice Department and from the Office of Management and Budget in terms of rescissions.

Even before the rescissions took effect, the Office of Juvenile Justice and Delinquency Prevention, through Mr. Regnery, had made a de facto termination of some of the funding last December. The Subcommittee on Juvenile Justice held an oversight hearing on that subject and went into it in some depth.

The difficulty is that when the administration requests a rescission, the funds stop and there are many juvenile agencies across the country which are unable to get their funding in the interim.

Now, the rescission will not take effect because the Congress has not agreed with it, but it was really apparent even prior to that time that the Congress would not agree with the rescission because in December a resolution that I introduced—and I do not claim any special credit for it, but the practice is that the chairman of the subcommittee takes the lead customarily—went through on a very crowded calendar, really, by unanimous consent.

The question that I have for you is, with the congressional statements on it consistent and with your own acquiescence to follow congressional lead, why does not the Department of Justice maintain the funding in a smooth flow?

Attorney General MEESE. Well, Senator, I think the problem that we had in December was an unusual one. It had to do with the Gramm-Rudman-Hollings Act being passed and the responsibility of the Department to respond to that in an appropriate manner.

This is not a matter that is limited to the Department's consideration, but also to the Office of Management and Budget and the executive branch as a whole. And so despite the resolution which you authored, you can never be sure what is going to happen on a rescission.

When the expenditures for a small organization like the Office of Juvenile Justice for a small series of programs is compared with other competing things by the Congress of the United States, such as foreign policy, national security matters, and other matters such as the drug enforcement program, and so on, what will ultimately happen—the only thing that the office did know was that if funds are gone, they cannot be recovered if, in fact, Congress did go ahead with the rescission.

But while you may differ as to the process, and I certainly respect your viewpoint on this, it was felt that good fiscal management required that those funds be temporarily delayed until the will of Congress could be determined in the rescission.

Senator SPECTER. Well, Mr. Meese, it is theoretically possible that Congress might have done that, but it seemed to me at the time, and does not, that in light of the repeated and emphatic statements by the Congress that that was not going to happen for the Office of Juvenile Justice and Delinquency Prevention, and that there was really great hardship to so many juvenile justice programs across the country.

I do not wish to belabor this any further, but what I would urge you to do and what I urge Mr. Regnery to do as we try to work out accommodations between the executive and legislative branch is to be a little more concerned about the stoppage of those programs and the very strong feeling that there is in the Congress, because it has come up again and again and it is a relatively small program.

We are not talking about big dollar amounts. We are talking about relatively small sums, but once they are cut off on those programs, it causes a tremendous amount of difficulty.

Mr. Meese, let me switch gears to the subject of international terrorism, a subject which I know has occupied a great deal of your time. I want to ask a question of you which I asked of Secretary of

State Shultz, and it is in the context of legislation I introduced which would make it a violation of U.S. law to assault a U.S citizen anywhere in the world.

It is Senate bill 1429, and I have heard about your favorable comments on the legislation in the past. The point that I want to discuss with you briefly is the issue of how to take into custody terrorists who violate U.S. law where we have set the jurisdictional base for trial in the United States.

As you well know, the 1984 Omnibus Crime Control Act contained provisions which cover terrorist acts involving hijacking and hostage-taking. In fact, there has been an indictment issued by the U.S. District Court for the District of Columbia.

Senate bill 1429, which I introduced, passed the Senate in February and covers a vacuum which presently exists by making it a violation of U.S. law to, for example, murder American citizens at the Vienna and Rome airports—acts which presently are now not covered—and also the murder of the 241 Marines in Lebanon in October of 1983, presently not covered, but would be under this act.

Then the tough question arises as to how to take these terrorists into custody, and the administration is certainly to be complimented on the way in which the *Achille Lauro* tragedy was handled, namely, forcing down the Egyptian airliner which contained the terrorists. The effort at that time was to take those terrorists into custody and to try them in the United States, but the Italians ultimately gained control under circumstances which are not worth recounting now.

But the issue is how to exercise our long-arm jurisdiction, how much force to use, and under what circumstances should force be used. I asked Secretary of State Shultz the following question in March when he appeared before the Foreign Operations Subcommittee of Appropriations: "Would you support an approach which would seek to take a terrorist into custody after warrants of arrest had been issued based on statements of probable cause, as indictments are now pending against the three hijackers of the TWA plane? Will you sanction the use of some moderate force to take terrorists into custody in remote parts of the world, to bring them back to the United States for trial?" Secretary Shultz said, "Yes, sir."

Now, this sets the stage for an easy question, and that question is would you agree with Secretary of State Shultz on that proposition?

Attorney General MEESE. I would agree with the Secretary. Obviously, it is hard to answer a hypothetical question where the specific course of action that might be needed would depend upon the particular facts.

But if it were necessary to utilize force to apprehend a fugitive and that was under all the circumstances, then I would agree with the Secretary. Normally, there are other means available in most parts of the world, particularly in the civilized world.

There are ways available through extradition, through cooperation with the police forces of the other countries. But I think there could be extreme situations when the United States would have to take action. I would agree with the Secretary.

Senator SPECTER. This has been a subject of questioning of Judge Soffirs, legal counsel to the State Department, in other hearings. I agree with you totally that it is not possible to answer the questions hypothetically, except in very, very broad parameters.

Judge Soffirs agreed that there might be some circumstances—and the tough part, of course, is to define what circumstances—which would warrant that kind of a use of force. But I think it is an important principle that we are not precluded from doing so by international law—there are some circumstances which should warrant the United States taking someone into custody under certain circumstances.

I take it from your nodding yes that you would agree with that.

Attorney General MEESE. I do, and I think the President probably has that authority at the present time.

Senator SPECTER. Well, I would agree with you; I think the President does, acting as the Chief Executive of the United States, and is not foreclosed by international law.

There is a case which I think is worthy of repeating as a matter of trying to get some basic familiarity with our national authority in the matter, and it is the case of *Kerr* v. *Illinois,* a Supreme Court decision which goes back many years, but is still a very valid precedent, where a man named Kerr was charged with fraud in Illinois and fled to Peru.

Illinois authorities went to Peru and took him into custody. You could call it an abduction, you could call it a kidnapping for a lawful purpose, to bring him back to Illinois for trial.

Mr. Kerr was brought back to Illinois, he was tried and was convicted. The Supreme Court of the United States upheld the conviction and said that it was all right to bring Kerr back under those circumstances.

What I would like to see done, Mr. Meese—and this is a matter of gaining public acceptance and, of course, having the stage set—is to use that kind of a surgical strike. I believe it was referred to in those terms by the Bush Commission which endorsed Senate bill 1429, to bring terrorists to the United States for trial.

I think it would be a great thing in international jurisprudence to bring terrorists back here, try them, convict them and punish them in our own courts right here in Washington, DC. Do you agree with that approach as a general proposition?

Attorney General MEESE. Yes, I do, Senator.

Senator SPECTER. Let me move quickly to a couple of other subjects, Mr. Meese.

You, Senator Laxalt, and I, as well as others have worked a great deal, on the career criminal bill, which for the first time brings the Federal Government into street crime, making it a Federal violation for a career criminal—that is, someone defined as having committed three or more robberies or burglaries—when that person is found in possession of a firearm, that creates a Federal crime under a provision of the omnibus crime control bill of 1984.

So far, it has worked out very well, and in negotiations with the Department of Justice we have written an amendment which we think would broaden the scope usefully to include, on the predicate offenses, crimes of violence or serious drug offenses.

The principal thrust is to bring within the ambit of the career criminal bill drug pushers. Yesterday, Congressman Hughes and I went to a notorious street corner in the city of Philadelphia, 8th and Butler, where there have been many arrests and many convictions, but very little by way of sentencing in the Pennsylvania State courts.

I took Congressman Hughes there to show him what a tough street corner looked like in the city of Philadelphia, and I would just like your comment in a general way about the desirability of pushing this amendment through, which would broaden the use of the career criminal bill to cover drug pushers as a category for defining a career criminal, as well as robbers and burglars.

Attorney General MEESE. Senator, I am very much interested in looking at that amendment, and tomorrow morning I am meeting with the Advisory Committee of U.S. Attorneys; I think it would be a good thing for me to discuss with them as well.

But I think that the kind of drug crimes which unfortunately have a great deal of attendant violence, particularly in many of the cities like Philadelphia—might well justify an appropriate extension of the original concept.

I might say, if I may, that I have been impressed with the way in which the original concerns of the National District Attorneys Association about that bill have been allayed by the responsible way in which our U.S. attorneys have been utilizing it and the fact that they have been getting the agreement and consent from the local district attorneys before they took on the cases.

Senator SPECTER. The fears about intrusion into State affairs did not pan out, did not eventuate.

Attorney General MEESE. Primarily because, I think, of the good judgment and the careful handling of these matters by our U.S. attorneys.

Senator SPECTER. Well, Mr. Meese, we have already gotten a letter from the Justice Department—I think it was signed by Mr. Bolton—in agreement with this amendment.

Attorney General MEESE. Right.

Senator SPECTER. But I would appreciate your taking a look at it. We are going to try to push it through the Criminal Law Subcommittee, and Mr. Hughes on the House side also is committed to it, and I think this amendment would be a very, very valuable asset.

One final topic, Mr. Meese, and that is the question of the District of Columbia Jail, and I would ask you about that only briefly here, if I may. Deputy Attorney General Jensen has testified before the subcommittee, and let me call your attention to a provision of the District of Columbia code which concerns me as to the responsibility potentially of the Attorney General in this matter.

It reads as follows: Section 24-425 says:

> All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and acts of Congress in the nature of municipal ordinances and regulations, shall be committed for their terms of imprisonment to such types of institutions as the court may direct to the custody of the Attorney General of the United States or his authorized representative.

The concern I have with the language of that statute is the responsibility of the Attorney General, you, to take care of the incarceration of those who are convicted in the District of Columbia.

What is your view on that?

Attorney General MEESE. Well, this is a District of Columbia statute passed by the city council of the District of Columbia?

Senator SPECTER. No. It was passed by the Congress, Mr. Meese.

Attorney General MEESE. By the Congress?

Senator SPECTER. Yes.

Attorney General MEESE. This is part of a very complex amalgam of responsibilities that has come to be, as you know, a part of the whole home rule situation which has evolved over a period of years.

The Attorney General does have a responsibility. This has been worked out with the District so that they would operate their own prison system. For reasons that I am not totally familiar with because they occurred prior to this administration came into office, there was a sharing of this custodial responsibility with the District of Columbia prison system and with the Department of Justice.

I think that, as Mr. Jensen has said, there is a responsibility on the part of the District to build a jail. Congress has appropriated the money, to a great extent through your good offices, in making sure that appropriation was available. So we have tried to be cooperative and to work with the District, but I think that there is also a shared responsibility on the part of the District for maintaining a prison system, like any other jurisdiction.

Senator SPECTER. Well, for these purposes, Mr. Meese, suffice it to conclude by my personal urging of you and the Department to try to get it worked out. I think there is a strong legal basis for reading this statute to make it the responsibility of the Attorney General and the Department of Justice under the facts of Washington, DC, and other this statute.

But the matter cannot await a resolution of any legal interpretation, and the Department has been very helpful with the District, but they are at loggerheads now, so to speak, and it is going to be a matter that is going to have to be resolved.

There is a very serious problem with public safety in this city today because the jails are so overcrowded that the judges are not sentencing people who ought to be sentenced to jail.

It is a big problem here and it has gone on for a long time. We just have to find some way to break the stalemate.

Attorney General MEESE. Well, as you know, Senator, the Department has been more than forthcoming in this matter. We have actually accommodated prisoners on a temporary basis to try to help the District, and really I think the solution to the problem, to which we want to contribute, is for the District to live up to its responsibilities of going ahead and building the new prison, as they should have done quite some time ago.

Senator SPECTER. Well, I know you have been supportive of that, and you would be supportive of that construction with appropriate federal participation.

Attorney General MEESE. Right.

Senator SPECTER. Thank you very much, Mr. Meese.

Thank you, Mr. Chairman.

Senator LAXALT [presiding]. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Mr. Meese, I want to first acknowledge that I was very pleased to see your public action yesterday in recusing yourself in the inquiry into a former assistant to the President at the White House. You said you would do that when you were here before the committee on confirmation and I am pleased that you exercised that without any urging from the committee, and I want to acknowledge that I think you did the right thing and you ought to get a strike in the right direction from this committee or from some of its members.

Attorney General MEESE. Thank you.

Senator DECONCINI. Mr. Attorney General, we have read news reports and heard rumors about the proposals to rewrite the INS asylum standards and procedures through certain regulations.

Can you tell us the status of these new regulations?

Attorney General MEESE. Senator, the regulations which were proposed by the Immigration and Naturalization Service have been going through a review within the Department. My understanding is that in the very near future, that review will be completed.

There have been various aspects of it, including some legal opinions, needed, and so on, and I expect that it will be reviewed by our senior management group within the near future; by that I mean within the next 30 days or so.

Senator DECONCINI. Do you know the thrust of them?

Attorney General MEESE. No, I do not know. I have not reviewed them myself; they have not come to my desk yet.

Senator DECONCINI. Do you know if the regulations are written so as to favor asylum applicants from Communist countries?

Attorney General MEESE. I do not know the details of the regulations, but I am sure that coming from a Communist country would be an important consideration, or should be, in consideration of an application on a case-by-case basis

Senator DECONCINI. I am concerned about the Refugee Act of 1980 which we passed, which does not set that out as a sole criterion, as I read it, and indicates that it takes more than just that. As far as I am concerned, that may be enough, but that is not what the Congress said.

There are, in my judgment, many countries that ought to be considered political asylum that are not today. Recently, with the indication that Nicaraguans are going to be granted asylum here, either temporary departure status or political asylum, and yet Salvadorans are not, I am concerned, Mr. Attorney General, that this new regulation is fair. I hope that you will exercise some participation in it when it gets to your desk.

Attorney General MEESE. I definitely will, Senator, and I share your concerns both that the regulations be fair, and also that they do carry out the intent of the Congress.

Senator DECONCINI. I am not at all upset that the INS would decide to—one regional director would decide to let in a certain number of people from Nicaragua. I applaud that. My objection with the administration is in not doing it for Salvadorans, who are in the midst of a civil war, also.

Now, on another subject, Mr. Meese, the National Narcotic Act of 1984 established a Drug Enforcement Policy Board to coordinate all Federal drug enforcement programs. You are the chairman of that board.

Frankly, it appears that the board is not doing much, but here is a chance for you to explain to us otherwise. NIMBIS goes about its way; the DEA and FBI do their thing and Customs operates its own air interdiction program, and Congress is working with DOD to bring them into the war on drugs.

The drug board seems to be sitting back and not doing much. Would you like to specify what coordinated efforts the drug enforcement plan has received from the board or can expect to receive from the board in 1987, and how many times did you meet and do you plan to meet in this subject matter?

Attorney General MEESE. Senator, the National Drug Enforcement Policy Board is meeting on approximately a monthly basis. One of the things we have tried to do is be sure that we have the personal participation of the Cabinet members, which is often a difficult thing to do because of travel schedules, but we have been, I think, very successful in getting the personal attention of the individual Cabinet members, including Secretary Shultz, Secretary Weinberger, and myself, for this matter.

As a matter of fact, I meet with the Drug Enforcement Policy Board staff on virtually a weekly basis to be sure that the directions of the board are being carried out. We have brought together all of the organizations you mentioned into a single coordinated group.

The old idea of having a separate organization for NNBIS on a parallel track is no longer the case. The National Narcotics Border Interdiction System is a part of the activities of both the National Drug Enforcement Policy Board and the coordinating group, which is the working level, the heads of the various agencies themselves who coordinate and direct these activities.

In addition to that, we have an active staff. We have a number of proposals that are now pending before the coordinating group and coming to the board, which will further increase our ability to handle the intelligence function by developing a proposal for an all-source intelligence center, improving our intelligence capabilities.

We have reviewed and been briefed upon the current interdiction efforts which have just been completed. We will be getting a review of that activity soon. So I think that the coordination which the Congress sought in the National Narcotic Act is being effected.

Senator DECONCINI. Have you been involved with the Bahama Initiative of a new aerostat balloon and the training of Bahamian drug police agents at the Federal Law Enforcement Training Center?

Attorney General MEESE. Yes, this has been reviewed with the coordinating group.

Senator DECONCINI. The southwest border, as you know, Mr. Meese, has become more of a focal point now for drug transfers and interdiction to the United States because of the shift of the drug dealers, realizing the enforcement emphasis placed on the Southeastern part of the United States.

A few weeks ago, five Senators joined me in a letter to the President calling on him to establish the Southwest Border Drug Enforcement Task Force, along the lines of the South Florida Task Force.

Senators Domenici, Wilson, Bingaman, Cranston, and Bentsen all share my concern that the drug trafficking threat has become so great along the southwest border that such a task force is crucial to mobilizing Federal, State, local, and other law enforcement resources.

You have been to Mexico recently and are aware far more than I am, I am sure, of this growing drug menace in the Southwest. Would you support the formation of such a task force along the southwest border, and can you give us any encouragement that that might happen?

Attorney General MEESE. Yes, Senator, we are very much concerned about that area, for the reasons that you mentioned. That is why I directed some time ago the coordinating group to develop a specific strategy for that area of the country, and they are preparing that and it will be presented at the next meeting of the Drug Enforcement Policy Board so we can proceed along those lines.

Senator DECONCINI. So I can take that as an indication that you think it is, let us say, likely that a southwest border task force may be formed?

Attorney General MEESE. We already have a southwest border region of the National Narcotics Border Interdiction System. What additional resources we may need to direct to that region and how we may want to organize the program will be the subject of the strategy which the coordinating group will present to us.

Senator DECONCINI. I see, so no decision has been made whether or not a southwest border drug enforcement task force might be formed along the lines of the south Florida task force?

Attorney General MEESE. Well, we already have a regional organization there which, in effect, does the same thing as the south Florida task force did. It is a matter, really, now of determining what the resource level needs to be.

Senator DECONCINI. Well, Mr. Attorney General, I hate to disagree with you, but I think you will find that the DEA and FBI are not involved in that——

Attorney General MEESE. That is why I say we may need to——

Senator DECONCINI [continuing]. Where they have been, and effectively so, in the south Florida drug force. I guess my question is do you believe that—or maybe you do not know what you are going to do, but I hope that you would look carefully at forming something similar to south Florida for the Southwest border because of the tremendous increase of drugs.

My question is, that has not been done yet?

Attorney General MEESE. Well, the organizational arrangement is already there; it is a matter now of determining what resources are needed, and that is what I have directed to be done. So I think I can assure you, Senator, that whatever resources are needed, we will have them there from whatever agency.

Senator DECONCINI. Do we have a time limit here?

Senator BIDEN. With the grace and good will of the chairman.

Senator DECONCINI. Mr. Chairman, what is your grace and good will today?

Senator LAXALT. Continue.

Senator DECONCINI. Thank you, sir.

Mr. Meese, you have been to Mexico and dealt with the law enforcement officials there, and maybe State Department people or whatever. I am very concerned that we have not been able to make headway in two very important areas. One is hot pursuit into Mexico when we know that there is a clandestine flight that will not identify itself, and you know more about it than I do, I suspect, but reports show that airplanes are coming to the border and then turning around and going back, or coming into the United States and turning around and going back and we cannot go after them, No. 1.

No. 2, the inability for us to take photos with infrared technology to pick out the fields of poppies and marijuana, which we were doing back in the late 1970's, with some success, in an eradication program—have you had any success, or can you give us any encouragement with your discussion with Mexican officials on these two areas or anyplace else?

Attorney General MEESE. Senator, we have had complete agreement on the second point as to the eradication program, including, it is my understanding, the photography, although I am not specifically sure about infrared, but the photography program; the identification of the fields; the eradication program; the verification program, which includes our people; and the development of common data bases for reference in terms of fields that need to and have been eradicated. I think in terms of the second point, we have achieved that, really, at our last meeting—well, at the events leading up to the last meeting and the last meeting that I held there.

As far as the matter of hot pursuit, this is still a matter of considerable sensitivity below the border and one that we are continuing to try to work out on an amicable basis between the two countries.

Senator DECONCINI. Are you in negotiations on that now?

Attorney General MEESE. We are continuing to talk with them about it.

Senator DECONCINI. Mr. Meese, let me ask you a question regarding the National Crime Information Center. It has come to my attention that the information under the NCIC is made available to States under the present law, and in some States many agencies are able to get a hold of this information for the purpose of verifying people who have made applications for contractors' licenses and other regulatory boards.

Public defenders sometimes get them and sometimes do not get them, depending on the State. I wonder if you could supply to me the criteria—and it does not have to be today—the criteria or regulations as to what States can do with these and what the Federal law is as to the States' regulation of these.

I think it is important, having been a prosecutor. The public defender and the defense are going to get them eventually, and it seems to me far better to work out an arrangement based on court decisions and what the law may be and go ahead and give them the information you have to rather than force them to go to court, just from the standpoint of expediting the trial.

Attorney General MEESE. I will be happy to get those regulations and provide them to you, Senator.

Senator DECONCINI. Thank you.

Mr. Meese, another subject matter: The Crime Victims Fund just seems to me to be one of the more innovative ways to go, and I know the administration has supported that in the past and I wonder if you can explain the cuts in the ceiling of the Crime Victims Fund and why the administration found that that was necessary at this time to make the cuts.

Attorney General MEESE. Senator, it is a matter, again, of finding reductions wherever we can find them within the budget. We have had about $65 million in the fund in 1986.

Senator DECONCINI. Is that what was collected? Excuse me.

Attorney General MEESE. I believe that was the amount collected, and we have about $37 million set forth for 1987.

It is our intent to look and see what the needs of the various States are and the needs of the various programs to fund at this level, which is about $100 million, then, over the 2 years, and then to evaluate the amount that should be needed on a regular basis for the fund and come back to Congress with that amount in the fiscal year 1988 budget.

Senator DECONCINI. How much of that 65 or 37 is from the collection of the surcharges on fines and penalties? Does it all come from that?

Attorney General MEESE. No; it comes from three sources. It comes from surcharge, it comes from fines, and it comes from forfeitures. I do not have the exact information as to the breakdown, but I would be happy to provide it to you.

Senator DECONCINI. But if you are talking about 100 million for 2 years and you have, what, 65 and 37, you are really taking in over 100 million, or you anticipate taking in over 100 million, over 2 years.

Attorney General MEESE. Over 2 years, right.

Senator DECONCINI. Is it not reasonable to at least allocate all that you take in back to the victims program?

Attorney General MEESE. Well, if you did that, you would be depriving the Federal Treasury, the general fund, of moneys that were originally coming to it before this program. You see, the surcharges themselves are all going into this program, and I feel that they should.

What we are trying to do is increase the amount of revenues generally that are brought in by fines and by forfeitures and by surcharges. But to allocate all of this would be, in effect, taking money away from the general fund which it has traditionally received as general Federal revenues.

Senator DECONCINI. It just concerns me, having had a recent experience in Arizona addressing the Crime Victim Foundation there and listening to some of those victims, that the amount of money we are talking about is so minor and the system is so geared to ignore and not to be participated in.

You have got a good thing going here. It seems like we ought to see more emphasis on it. I realize your concern there, but my concern is that we do not shortchange this fund and I do not know how to emphasize that with you.

I cannot tell you what to put in it, but it seems to me like we are losing sight of the objective of it.

Attorney General MEESE. Well, we certainly do not want to shortchange the fund, Senator. But, remember, this was an initiative of this administration. It is one to which we are very committed, and unlike some of the other programs which, on the basis of priorities, we had to request total elimination of the funding, this is one we definitely do want to continue.

Senator DECONCINI. I know the Senator from Nevada has been a leading force on this fund, and I have not talked to him about it, but I just would like to see it increased from the $100 million over 2 years. I know my State can certainly use more, and we are a very small State.

Senator LAXALT. We have received a tremendous amount of mail on this from throughout the country. There is a strong feeling about this, General.

Senator DECONCINI. Thank you, Mr. Chairman; I agree with you so much.

On the question of the NCIC, in addition to the rules and regulations, I am interested in knowing what States, if your Department knows, do make this information available to public defenders and defense counsel as part of a process rather than having to go through the courts to get it, if that information is available.

Attorney General MEESE. I will see if that information is available. Generally, I think once the information gets to the States, we do not pursue further dissemination unless there is some violation of the regulations, but we will inquire into that.

Senator DECONCINI. Mr. Meese, that is really where I am getting to, to see whether or not the States are complying with what the Federal regulation is in this area.

Attorney General MEESE. Well, that is very closely monitored by the FBI.

Senator DECONCINI. It is, you say?

Attorney General MEESE. Yes.

Senator DECONCINI. As to what the States do?

Attorney General MEESE. That they not act in contravention to the Federal regulations and the Federal law on the subject.

Senator DECONCINI. Well, that would be very helpful to have, what their monitoring procedures are, because I am concerned in my State that they may not be monitored, but I do not want to say so without knowing what those procedures are.

Mr. Chairman, I have no further questions. Mr. Biden, I think, is returning for some questions. There is a vote on. He went to vote and said he would be back.

Senator LAXALT. All right. We will stand in recess again.

Senator DECONCINI. Thank you.

[A brief recess was taken.]

Senator BIDEN [presiding]. Thank you, General. I spoke to Senator Laxalt on the way over. I am not going to take very long. I have two areas I would like to pursue.

The first area is the question of tort reform, which is obviously a burgeoning issue and may become the issue of the decade, the way it is going now in terms of concern on the part of the American people and requirements of this committee to look at it.

The question of tort reform and the liability insurance crisis—the administration's Tort Policy Working Group which reported to you indicates that the task force was established last fall.

Can you tell us how this group came to be put together and who the members of the working group are?

Attorney General MEESE. Senator, this is a regular working group of the Domestic Policy Council, which is one of the three Cabinet councils that we have. It is made up of representatives of various departments that have expertise or interest in the subject.

I do not know all the members. I would be happy to provide you with the names of the members. It was chaired by Rich Willard, who is the Assistant Attorney General in charge of the Civil Division of the Department of Justice.

Senator BIDEN. That would be very helpful if you could make that available, and also for the record if you could indicate what, if any, particular expertise each of these individuals had to have qualified them to serve on the task force.

For example, were any of them trial lawyers, were any of them defense lawyers, in their past incarnations? Do any of them have any particular knowledge about the insurance industry?

One question you might be able to answer now is were there representatives—I am told there were not, but I do not know—representatives from the Federal Trade Commission, the one agency which has some expertise in insurance matters? Were they included in the task force?

Attorney General MEESE. I do not know whether they were included in the task force. I do believe that they were consulted or that their information was provided to the task force.

Senator BIDEN. Good. Well, that would be useful information for us to have because it is obviously something we are both, I suspect, going to be spending a lot of time on in the near term.

Skipping to another subject, so I do not keep you very long here, the Pornography Commission, there have recently been several articles in the newspapers about the Pornography Commission and I wonder if you could give this committee an update on the status and timetable for their report, if you know.

Attorney General MEESE. The Pornography Commission is supposed to be reporting by around the 30th of June. It is my understanding that they may require an additional 30 days, or so, to assimilate in their report some additional information on some studies which have been done more recently.

So I would anticipate that we will have a report from them some time this summer, possibly as early as the 1st of July; it could be as late as August.

Senator BIDEN. Are you expecting legislative proposals based on these findings and recommendations of the Commission?

Attorney General MEESE. I do not know what their recommendations are. I do not have any idea of what might be in their report. There may be recommendations for legislation. I do not imagine we would get legislative proposals, per se.

Senator BIDEN. I did not mean that. I mean is it contemplated by you, the Attorney General, and the Attorney General's department, the Department of Justice, that based on the recommendations from the Pornography Commission, you will contemplate the

drafting of and submission of legislation to deal with their recommendations.

Attorney General MEESE. Well, that would pertain to what their recommendations are. I really cannot prejudge what we might receive.

Senator BIDEN. The reason I ask the question, General, is that there is going to be a tendency up here to prejudge what the Commission will or will not recommend. I quite frankly think that there can be some very positive things that might come out of that, if we approach it the way you have been, which is to not prejudge it and make a judgment based on the recommendations.

We already have had several of our colleagues, based on preliminary statements by individual members of the Commission and/or statements by the Commission, drafting legislation without any hearings, without any discussion, and without benefit of the participants in the report.

I, for one, think it is a subject we have to address, but I hope we will do it in the manner in which the Justice Department is viewing it, which is the way you have just answered it; that is, you are waiting for the recommendation and you will make a judgment then. Is that correct?

Attorney General MEESE. That is correct.

Senator BIDEN. I have about several more questions that go to specific aspects of the budget, as proposed, but I will not take your time at this moment.

But I will submit them in writing. Also I suggest to you that we had for several years in the Carter administration a running battle on the implementation of forfeiture legislation, which finally they came around to pay attention to and use more and you have done better with it, in my view.

Finally, Mr. Attorney General I would like to discuss with you whether or not you believe personally that there is enough focus on the use and implementation of RICO and civil RICO in the Justice Department.

I know from having been on this committee for, gosh, I do not know how long now—it is almost going on a dozen years—that there are so many things on the plate of the Justice Department, so many responsibilities, and Attorneys General and Assistant Attorneys General and members of the Justice Department out in the field tend to have difficulty refocusing, understandably, and implementing tools that are sometimes there and they have not paid enough attention to.

I sincerely do not say that critically. Like we found in forfeiture, it sat there; it was so complicated, they thought, to use it. No one was pushing it hard from the top, and therefore the tool essentially sat dormant; it just sat dormant for about 6 years.

I do think there can be a greater application of RICO, and particularly civil RICO, and maybe sometime we can sit down and talk about that, not in the context of this hearing.

It will probably shock the press that you and I could sit down and talk about anything. But all kidding aside, it is worth something that I would like to lobby a little bit in terms of the degree to which the Department field people are cognizant of using RICO.

Attorney General MEESE. Well, Senator, I would be happy to discuss it with you. I can tell you that there has been, as you know, a great increase in the number of RICO actions.

Senator BIDEN. Correct.

Attorney General MEESE. And one of the things I require is a monthly report on how many RICO prosecutions and continuing criminal enterprise prosecutions there have been, particularly by Organized Crime Drug Enforcement Task Forces, but we also get similar reports from the U.S. attorneys.

Senator BIDEN. Well, that is good. The civil RICO part is the part that I think is a particularly valuable tool in that area, and also in matters of white collar crime concerns.

Well, Senator Grassley asks that I submit a statement and questions, and I would appreciate it if you would respond to those.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman: I want to thank you for holding today's hearing on the reauthorization of the Department of Justice and I want to thank Attorney General Meese for being here today to represent his department.

As our nation's principal law enforcement institution, the Justice Department is a vital instrument in fulfilling the government's obligation and commitment to vigorously investigate and prosecute criminal activity, both within and beyond our borders when Americans are victimized.

Although the Department is to be commended for the accomplishments it has made in successfully dealing with some areas of crime, as with all human institutions, there is room for improvement.

Specifically, the common-place practice of defense procurement fraud must be dealt with by more vigorous and effective methods and personnel.

Those that undermine our national defense and the security of our country through overpricing, kickbacks or producing faulty weapons must be prosecuted and punished to the fullest extent of the law, without reservation.

Moreover, as recent hearings have indicated, increased prosecutions and punishments are needed in the area of white collar crime in general. Corporate crooks must learn that long term costs will outweigh any short term benefits gained through white collar crime.

In addition, the federal government cannot abdicate its obligation to assist local law enforcement institutions in dealing with juvenile crime and rehabilitation. These juvenile justice programs are essential and although the funding for them may be reduced, Congress will not terminate them as suggested in the Administration's proposed reauthorization bill.

Thank you Mr. Chairman and I look forward to hearing the testimony of today's distinguished witness, Attorney General Edwin Meese, III.

Senator BIDEN. As I started to say, there is going to be a full plate, between white collar crime, which you are working on, and the whole tort area, and the usual just plain, old organized crime problems, coupled with the judgeships that you are dealing with and we have to be dealing with. It is going to be a full year, as it always is, and I look forward to working with you on it.

Attorney General MEESE. Thank you, Senator.

[The prepared statement follows:]

STATEMENT

OF

EDWIN MEESE III
ATTORNEY GENERAL

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the 1987 budget request for the Department of Justice. This request reflects the law enforcement initiatives that the President has maintained for this Department for the past five years. These initiatives focus on supporting the core functions of the Federal Government and ensuring that these responsibilities are aggressively and effectively implemented. The budget provides for increases in these areas where the need for additional resources is urgent. It provides for significant, selective reductions in order to accomplish the mandate of reducing the Federal deficit.

The President's budget clearly recognizes that Federal law enforcement functions must be maintained and strengthened. The Department's Fiscal Year 1987 law enforcement priorities will include confronting and attacking international and interstate drug trafficking and organized crime, exposing and stopping those who threaten the nation's internal security, prosecuting the purveyors of hate who violate our civil rights laws, developing the Federal Prison System to meet the expanding demands that are being placed on it, and representing the Federal Government in an ever increasing range of litigation.

Our budget request for $4.3 billion and 64,415 permanent positions is designed to emphasize our core law enforcement responsibilities. Our positions, when compared to 1986, will grow by more than 1,100 and our budget authority will increase proportionately. As we maintain and strengthen these core law enforcement functions, we will undertake to reduce expenditures in other areas in order to accomplish another top priority of the President--to reduce the deficit.

First, we will seek management improvements in our own programs. Second, we will explore whether certain activities can

be provided more effectively by the States or by private entities than by the Government. Third, we have identified certain services, such as training of State and local law enforcement personnel, where costs can be more equitably shared. Finally, we must confront the circumstance that some of the grant programs have outlived their mandates. We must distinguish between programs that should be conducted at the national level and those that should be funded at the State or local level. We do not believe that a history of Federal assistance dictates further assistance. Indeed, we believe that Federal assistance has tended to perpetuate the least viable law enforcement programs.

Program Increases

Last year, the Administration and Congress enacted a new drug initiative. Significant increases were provided to the Drug Enforcement Administration (DEA), the United States Attorneys, and other agencies engaged in the drug war. The 1987 budget request for DEA continues to reflect the President's deep concern that illegal drugs are the nation's number one threat to safety and stability. In 1986, the Congress approved $380 million for DEA. For fiscal year 1987 we recommend that this amount be raised to $411.3 million. Program increases proposed at DEA include 138 positions and $10.1 million to expand domestic investigations and improve intelligence and laboratory services; 9 positions and $8.9 million to upgrade automatic data processing and telecommunications; and 9 positions and $9.1 million to purchase and maintain voice privacy radio equipment. These and similar expenditures are critical to the integrity, safety, and effectiveness of the investigations conducted by the Department's law enforcement agents.

While primary responsibility for enforcing the drug laws resides in DEA, this effort requires the resources of many other organizations. In October 1982, the Administration undertook significant steps to make more effective and efficient the Government's enforcement program. The Organized Crime Drug Enforcement Task Forces that we launched at that time have been remarkably effective in fostering interagency cooperation. The

1987 budget furthers this cooperative effort with requests to provide additional drug enforcement resources to the Federal Bureau of Investigation, the Marshals Service, the U.S. Attorneys, and the Criminal and Tax Divisions.

Our ability to deal more effectively with all forms of crime, including drugs, will be enhanced by the new resources requested for the FBI. To counter the threat of foreign intelligence activities and meet the needs of other field investigative programs, we are requesting enhanced resources. For the Foreign Counterintelligence Program we have increased our resources significantly for four successive years. We are proud of the recent successes that the FBI has had in unearthing espionage cases. Our request for an increase in this area, however, is premised on our continuing concern relating to the activities of foreign agents and their ability to obtain valuable information relevant to the national security.

To assist the FBI, our request includes a challenging proposal to apply the techniques of artificial intelligence to investigations in such areas as narcotics, terrorism, and organized crime, particularly labor racketeering. The 1987 cost to undertake the program is $12 million.

The FBI request includes roughly $25 million for voice privacy to better protect and enhance the effectiveness of our law enforcement agents. As I stated earlier with regard to the Drug Enforcement Administration, this is an important program that impacts upon the FBI, DEA and Marshals Service. Additional voice privacy resources, totalling $8.5 million are included for DEA and the Marshals Service. The FBI has been given the lead in developing a more secure radio communications system for the Department's investigative agencies.

A less dramatic, but nonetheless critical need of the FBI is for 469 positions and $10 million to strengthen support services. The recent increase in agent positions and the use of Title III wiretaps and the use of other specialized investigative techniques has left the FBI with inadequate clerical, typing and tape transcription resources. Without these resources, cases

cannot be effectively prepared for trial, and investigations will be stalled.

The 1987 budget will bring the combination of FBI and DEA agent strength to new heights. This, together with the increased strength in the United States Attorneys' Offices, will place the Department in a better position than before to investigate serious crime and bring more cases to trial.

Our success in developing more major cases with more defendants has caused some difficult problems at our prisons. The nation's commitment to fighting crime is reflected in the prison population. Since 1981 the Federal prisoner population has increased 49 percent and despite our prison construction efforts, the prisons remain overcrowded.

In 1987, we plan to activate additional housing units in Alabama, Oklahoma, and Florida. With the construction requests in this budget, we expect to be able to respond better to future needs. We are optimistic, not just about the funding request, but because we have sites selected for three new Federal Correctional Institutions, with accompanying camps, at Bradford, Pennsylvania; Marianna, Florida; and Sheridan, Oregon. For the first time in many years, we have been able to identify specific sites for new facilities at the point the budget is submitted. In addition, it should be noted that the requested $145.5 million "Buildings and Facilities" request for 1987 will allow us to add 250 bedspaces to existing facilities in Arizona and Illinois as well as to conduct major renovations at several existing institutions.

The 1987 budget also continues funding for contracts with local jails to house Federal prisoners and maintains the Cooperative Agreement Program which provides limited funding to renovate, construct, and equip jails that guarantee space for Federal prisoners.

Aside from the FBI proposal to apply artificial intelligence techniques to complex criminal investigations, there are a number of important new and expanded uses for automated data processing planned within the Department. For the Federal Prison System and

the Drug Enforcement Administration, we are requesting $16.9 million to replace and upgrade ADP and telecommunications equipment. We are also asking for an additional $10 million to apply advanced office automation capabilities to the Department's litigating components. This will allow the Department the means to coordinate its procurement strategy, ensure that the various divisions are compatible, and obtain the most efficient and effective systems for the overall Department. Additionally, $4 million is requested to implement a new Departmental Financial and Administrative Management Information System (FAMIS). Implementation of FAMIS is necessary to ensure the Department's compliance with accounting and financial standards imposed by law.

Although we are reexamining the Immigration and Naturalization Service's overall ADP and telecommunications plan, we have decided that we must move forward with the Systematic Alien Verification and Entitlement (SAVE) System. We are asking for $1 million to expand this effort. The SAVE System allows States to exchange information with the INS to verify whether applicants for entitlements may in fact be ineligible because of their alien status. The SAVE System may also help to cure the underlying problem of illegal immigration, as it will undercut some of the motivation for illegal entry into the United States.

The Department's role in defending the United States and its Treasury in civil litigation has substantial financial impact and is unfortunately an area where our responsibilities have been increasing dramatically. For 1987, we are requesting 114 new positions and approximately $5.8 million to help meet these growing responsibilities. The largest segment is for the Civil Division to defend tort claims involving asbestos and radiation exposure as well as contract claims. An increase is requested for the Tax Division so that it may undertake its increased burden involving appellate litigation and organized crime drug enforcement matters. The Land and Natural Resources Division, in addition to conducting litigation to enforce the environmental laws, defends the Government in environmental actions. This litigation also has increased. The U.S. Attorneys need more resources for both tort and contract work.

Limited increases or changes are found in other programs of the Department. We propose to expand the U.S. Trustee pilot program in bankruptcy cases to two additional districts where a need has been demonstrated. The Administration also intends to submit legislation to the Congress to transfer to the Department of Justice some of the functions of the Interstate Commerce Commission. The Antitrust Division budget reflects these anticipated additional responsibilities. Finally, no budget request for the President's Commission on Organized Crime is being submitted because the Commission, consistent with its mandate, is completing its tasks during 1986.

Reductions and Savings

The reductions reflected in the budget, although perhaps less popular than the increases, are just as important to implement.

The Department is proposing to charge State and local trainees for costs incurred for travel, meals, and lodging. The costs of instruction and other training expenses will continue to be borne by the FBI, DEA, and the National Institute of Corrections. Judging from the experience that we have had over the years at the Federal Law Enforcement Training Center at Glynco, Georgia, we think that State and local agencies will be willing to pay a greater share of the costs associated with training. This policy will bring the Justice Department into conformity with other cabinet departments which charge user fees in similar circumstances.

The changes planned for the Office of Justice Programs, are more controversial. It was probably no surprise that the 1987 budget contains no new funding for Juvenile Justice programs, the Regional Information Sharing System, or the Mariel-Cuban grants. This Administration has consistently opposed new funding for these programs. As you know, Congress did not act upon the Administration's proposal to rescind 1986 funds in these programs. This rescission request included the State and local assistance program was well as the obligation limitation established on the Crime Victim Fund. On the latter program, you may remember, the Comprehensive Crime Control Act of 1984

established a ceiling of $100 million to be spent annually for state, local, and federal crime victims programs. The $35 million for 1987 is a significant Federal contribution toward these programs.

The National Institute for Justice and the Bureau of Justice Statistics will continue to provide a nationwide research and development capability. Both of these organizations perform services that can be conducted only on the national level. The 1987 request for the Bureau of Justice Statistics, includes an increase of $3 million to implement the first phase of the redesign of the Uniform Crime Report. The Administration's budget request also provides level funding for the Public Safety Officers' Benefits Program and Emergency Assistance, and the Missing Children's program.

The Department has recently submitted its proposed authorization bill to the Congress. It reflects the needs I have discussed to maintain and strengthen our law enforcement responsibilities. The President's Fiscal Year 1987 budget addresses the obligation to reduce the deficit to the target level. In reaching this target, the Administration determined to fund certain core functions that the Federal Government must perform. I urge the Committee to join in this decision-making process and to concur in the resources we have requested. We must avoid the narrow perspective, as proposed by H.R. 4356, of freezing most of the Department's appropriations categories at the Fiscal Year 1986 level. We cannot abdicate our responsibility to see that the laws are effectively enforced.

With regard to H.R. 4356, the bill as introduced provided, with limited exceptions, no acknowledgement of the increased resource needs of the Department. The failure to address particular needs departs from a rational budget process. On April 22, 1986 the House Judiciary Committee reported H.R. 4356 with two amendments that provided increased funding levels for the Bureau of Prisons and U.S. Attorneys. H.R. 4356 is still approximately $124 million short of the funding levels we see as absolutely necessary to maintain and strengthen our law

enforcement responsibilities. For example, the levels proposed by H.R. 4356 would undercut the FBI's foreign counterintelligence efforts that are vitally important to our national security. Additionally, the United States Marshals Service has undertaken increased responsibilities as a result of recently enacted crime legislation. More warrant investigations must be undertaken and more prisoners, many of whom are violent, must be processed and confined. Nor does H.R. 4356 recognize the increased responsibilities of the Marshals Service in the area of courthouse security. In this era where government functions, particularly that of the federal judiciary, are subjected to increasing dangers, we must be able to meet our responsibilities. Moreover, H.R. 4356 does not recognize the need of the Marshals Service to support our Organized Crime Drug Enforcement Task Forces. Finally, H.R. 4356 ignores the substantial exposure of the Treasury to the ever increasing burden of lawsuits filed against the United States seeking monetary damages. It is a fundamental responsibility of the Department to defend these claims in order to protect the tax dollar. Failure to provide the necessary resources will have an substantial negative impact on these efforts.

Our authorization bill also contains several substantive provisions. For example, we have proposed permanent undercover authority for our law enforcement bureaus. This authority has been revised to reflect more accurately the needs of our undercover operations. The bill also contains amendments regarding the Bureau of Prisons that allow for exchanges of prisoners with state institutions and for the conduct of autopsies when appropriate. Additionally, we have included a provision specifically authorizing the FBI to conduct law enforcement training, in the United States and abroad, for foreign law enforcement personnel. Another provision contains our proposal, previously submitted to Congress, revising the laws pertaining to the United States Marshals Service. Finally, the Department's authorization proposal also differs significantly from those in the past in that it has a more functional

structure. It also authorizes most categories on a permanent, rather than annual, basis.

Before closing, I would like to say a word about the Gramm-Rudman-Hollings sequester process for 1986. We anticipate resolution of the constitutional issues in the coming months by the Supreme Court. This litigation, however, must not divert us from our resolve to confront the deficit. Because the District Court's decision has been stayed, and the legislation established an alternative procedure for accomplishing the necessary reductions, our financial plans continue to anticipate a 4.3 percent reduction in 1986 budget authority. We have been studying the programmatic impact of projected budget cuts, as well as any increased responsibilities we must meet, and are making plans to ensure our ability to carry out the core Federal law enforcement program.

The Department's budget represents a balancing of the many interests that compete for Federal resources. It candidly favors those areas that are essential elements in the enforcement of Federal law. In an era that requires more than fiscal restraint, we must allocate resources only where the core functions are involved and where expenditures can be effectively utilized. To do otherwise, is to ignore our substantial responsibilities to the public which needs the protections of both a strong Federal law enforcement program and a fiscally sound budget.

I would like to thank the Committee for this opportunity to present the views of the Department of Justice.

Senator BIDEN. Thank you.
The hearing is adjourned.
[Whereupon, at 12:29 p.m., the committee was adjourned.]

APPENDIX

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Please find attached responses to questions posed by Senate Judiciary Committee members to the Attorney General following the Attorney General's testimony concerning the Department of Justice Authorization bill.

I regret the delay in responding to these questions. You may note that we are still awaiting final responses to some of the questions. However, I wanted to ensure that you receive the enclosed responses without further delay. The remaining responses will be sent shortly.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

Defense Procurement Fraud Unit and Government Fraud Budgets:

Q. Under what section and line item in the proposed Justice Department budget is the Defense Procurement Fraud Unit's funding reflected?

A. There is no specific line item in the budget request for Defense Procurement Fraud Units, however, the Criminal Division has a line item for a Fraud Unit which is composed of four litigating branches and a Defense Procurement Fraud Unit. In addition, investigation of procurement fraud is also handled by the Criminal Litigation sections of the United States Attorney offices, the Commercial Litigation Section of the Civil Division and the General Crimes Section of the Federal Bureau of Investigation.

Q. What is the proposed FY 1987 funding for the Fraud Unit and how does it compare with FY 1986 funding?

A. Prior to the Gramm-Rudman-Hollings sequestration the FY 1986 funding for the Fraud Unit of the Criminal Division was $4,860,000. The FY 1987 request for the Fraud Unit is $5,233,000.

QUESTIONS FROM SENATOR GRASSLEY

Q. In your statement, I note an emphasis on priority programs and a need to cut certain programs in order to lower the deficit. I also note, however, that there was no mention of the Defense Procurement Fraud Unit, its level of priority or its budget -- nor was there any mention of Justice Department efforts in the areas of government fraud in general. In the past, the Department has indicated that prosecuting and recovering funds lost to fraud against the government is a top priority. In your plans for FY '87, has government fraud been shifted off to a category of lesser priorities?

A. The prosecution of cases involving fraud against the government has been the top priority in our efforts to combat white collar crime for several years. There is no change in the priority status of government fraud cases for fiscal 1987, or for the forseeable future.

In particular, the Defense Procurement Fraud Unit is to be continued at its present strength of 15 attorneys, drawn from both the Department of Justice and the Department of Defense. If anything, the number of attorneys assigned to that Unit will be increased as case load demands increase in the future. These attorneys will continue to work full time on defense procurement cases, supported by the investigative resources of both the Federal Bureau of Investigation (FBI) and the Department of Defense. In addition to its own

prosecutive efforts, other Unit cases are handled by attorneys in the Fraud Section and the Unit refers a large number of cases to United States Attorneys. Our maintenance of the Defense Procurement Fraud Unit at its present strength reflects our commitment to treat government fraud cases in general, and defense procurement cases in particular, as matters of top priority.

In addicion, although the Civil Division does not formally allocate positions authorized by Congress by category of work, the attached chart shows the number of civil attorneys,aside from those in the Offices of the U. S. Attorneys, who handle civil fraud matters.

Frauds "Section" of the Commercial Litigation Branch:

	Attorney	Other Professional	Para Professional	Secretary	Other	Total
4/83	25	0	5	15	2	46
1/84	25	1	4	14	2	46
6/10/84	26	1	5	16	2	50
1/85	29	1	7	16	2	55
6/9/85	31	1	6	17	1	56
1/86	30	1	5	18	1	55
5/10/86	30	1	3	16	1	51

Regional Government Fraud Units

Q. Is there any earmarking of funds for United States Attorneys' offices that would go toward regional Government fraud units--or regional white collar crime units?

A. The United States Attorneys do not distribute funds to any regional fraud units or any white collar crime units. Except for one very specialized situation, dealing with coal fraud, we do not believe any such regional units exist.
On an individual basis, some United States Attorney offices have developed innovative approaches to the prosecution of Government fraud in conjunction with their state or local counterparts. In the Northern District of California, the United States Attorney and 15 local district attorneys have initiated project GIRAFFE (Gathering Interstate Resources to Apprehend Fraud Fugitives Everywhere). This project was initiated when it was discovered that it was too costly to extradite persons involved in welfare fraud who had left the state. Under project GIRAFFE, Federal prosecutors have agreed to prosecute defendants in the district where they are arrested, providing the defendants consent. If they do not consent, extradition can still be used. This successful program has now been adopted by a number of United States Attorneys and the savings to the taxpayer are becoming significant.

Regional Government Fraud Units

Q. Can you indicate the number of personnel devoted to government fraud cases and whether the proposed FY '87 budget reflects any increases or decreases in those numbers?

A. Aside from the 15 attorneys in the Defense Procurement Fraud Unit of the Criminal Division and the 30 attorneys in the Commercial Litigation Branch of the Civil Division, it is impossible to give an exact figure for the Offices of the United States Attorneys as government fraud cases are not confined to particular units in those offices. However, such cases are given a high priority and are being successfully pursued civilly as well as criminally. Our experience for the last five years has demonstrated that approximately 20% of our white collar crime prosecutions have been government fraud cases. For example, the Summaries of Significant White Collar Crime Cases Completed in 1985, which were provided to the Committee by the Deputy Attorney General on February 27, 1986, referred to a total of 407 prosecutions. Of these, 105 cases, or approximately 26% of the total, were cases classified as government fraud or procurement cases. We have no reason to anticipate any substantial change during the coming year. Our proposed budget does not provide for an increase or decrease in the number of personnel devoted to government fraud as such. However, some of our requested increases, particularly those requested for the United States Attorneys Offices and the FBI, will undoubtedly enhance our ability to investigate and prosecute government fraud cases.

Q. Has the Department made any changes in its travel policies, i.e., are main DOJ attorneys traveling less due to budget constraints or has there been no change?

A. Revised department-wide travel orders or directives have not been issued. However, individual components of the Department are imposing constraints to reduce travel funds as a result of the Gramm-Rudman-Hollings sequestrations. For example, travel for training, relocations, etc., has been either reduced or eliminated. Our primary concern remains ensuring the availability of travel funds to perform the duties charged to the Department as the chief law enforcement and litigative agency and we know of no instances where essential travel has been eliminated.

Palestine Information Office (P.I.O.) political representation of the Palestine Liberation Organization (P.L.O.)

Q. Why hasn't there been at least a routine inspection of the P.I.O. given the fact that the P.L.O. engages in terrorist activities and there are reports that the P.I.O. has been used in the forgery of documents?

A. The answer to this question will be forthcoming.

Office of the Attorney General
Washington, D. C. 20530

12 July 1985

MEMORANDUM TO: All United States Attorneys

FROM: Edwin Meese III
Attorney General

SUBJECT: Law Enforcement Coordinating Committee (LECC) Program

As you are aware, the Attorney General's Task Force on Violent Crime specifically recommended that United States Attorneys establish Law Enforcement Coordinating Committees (LECCs). On July 21, 1981, Attorney General William French Smith issued Department of Justice Order 951-81 creating an LECC in each judicial district throughout the country. The broad objective in instituting the LECC program was to enhance coordination of local, state, and federal resources in order to produce more effective law enforcement. Since becoming operational, the LECCs have been instrumental in providing forums for the joint exchange of information and many successful law enforcement strategies and operations can be attributed to them.

A primary responsibility of the Department of Justice is to work closely with prosecutors, police, and other criminal justice agencies to insure that all levels of government are more effective in protecting citizens against serious and violent crime. The LECC program, which stresses cooperation with and assistance to state and local law enforcement agencies, is one of the Department's highest priorities. You should continue to vigorously implement the LECC initiative, schedule regular meetings with State, local, and Federal law enforcement agencies, and establish and utilize specific subcommittees where appropriate. The Department will continue its efforts to institutionalize the LECC concept and it is my intention to participate in as many LECC meetings as possible so as to work with all of you to insure that this important program continues to achieve its law enforcement objectives.

April 4, 1986

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS
Calendar Year 1986

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
ALABAMA Middle	Date Spkr	05-09-86 Statewide	09-86				
Northern	Date Spkr	01-09-86 Crim/Cates	04-11-86	05-09-86 Statewide			
Southern	Date Spkr	05-09-86 Statewide					
ALASKA	Date Spkr	(11-08-85)* ADAG/HART					
ARIZONA	Date Spkr	1/16-17/86 FBI/USMS/EOUSA	4/18 & 25/86	06-26-86			
ARKANSAS Eastern	Date Spkr	02-01-86 jt w/WD	2/27-28/86 jt w/WD	06-19-86 jt w/WD			
Western	Date Spkr	01-31-86 BJS/Vines	02-01-86 jt w/ED	2/27-28/86 jt w/ED	06-19-86 jt w/ED		
CALIFORNIA Central	Date Spkr	(11-19-85)* AAG/Crim					
Eastern	Date Spkr	02-21-86					

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
CALIFORNIA Northern	Date Spkr	03-20-86 DAG					
Southern	Date Spkr	01-08-86 Crime/G. Shur	02-12-86	03-19-86			
COLORADO	Date Spkr	03-18-86					
CONNECTICUT	Date Spkr	01-21-86 AFO/OJP					
DELAWARE	Date Spkr	(02-22-85)*					
DISTRICT OF COLUMBIA	Date Spkr	(02-25-85)*					
FLORIDA Middle	Date Spkr	(11-01-85(T))*					
Northern	Date Spkr	3/20-21/86	07/10-11/86 FBI/USMS	10-86	11/86		
Southern	Date Spkr	(03-14-85)*					

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
GEORGIA Middle	Date	01-17-86(T)	03-19-86				
	Spkr	AG/FBI Lanning	jt Turner/WH				
Northern	Date	01-17-86(T)	03-19-86				
	Spkr	AG/Lanning	Turner/WH				
Southern	Date	01-17-86(T)	03-19-86 jt				
	Spkr	AG/FBI	Turner/WH				
GUAM	Date	(11-21-85)*					
	Spkr						
HAWAII	Date	03-20-86					
	Spkr						
IDAHO	Date	01-27-86	06-17-86				
	Spkr		jt w/EDWash				
ILLINOIS Central	Date	(10/22-26/84)*					
	Spkr						
Northern	Date	(12-11-85)*					
	Spkr						
Southern	Date	(04-24-85)*					
	Spkr	Crim/DAAG					
INDIANA Northern	Date	03-27-86	4/23-25/86(T)	06-24-86			
	Spkr	DAG w/SD		jt w/SD			

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
INDIANA							
Southern	Date	03-27-86	06-24-86				
	Spkr	DAG w/ ND	jt w/ND				
IOWA							
Northern	Date	(03-22-85)*					
	Spkr						
Southern	Date	01-29-86	05-14-86				
	Spkr						
KANSAS	Date	(12-12-85)*					
	Spkr	BJA/Vines					
KENTUCKY							
Eastern	Date	04-09-86					
	Spkr	DAG					
Western	Date	03-05-86					
	Spkr	FBI/AFO					
LOUISIANA							
Eastern	Date	(06-11-85)*					
	Spkr						
Middle	Date	03-20/86					
	Spkr						
Western	Date	02-05-86					
	Spkr						

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
MAINE	Date Spkr	01-30-86 Crim/Cates	04-14-86				
MARYLAND	Date Spkr	(09-28-84)*					
MASSACHUSETTS	Date Spkr	04-09-86					
MICHIGAN Eastern	Date Spkr	05-12-86 Crim/Trott					
Western	Date Spkr	(12-11-85)*					
MINNESOTA	Date Spkr	01-21-86	03-18-86	04-30-86 FBI/Harpold	10-86 AG invited		
MISSISSIPPI Northern	Date Spkr	2/3-4/86(T) jt w/SD	09-18-86 FBI/DePue				
Southern	Date Spkr	1/29-30/86(T)	2/3-4/86(T) jt w/ND	4/3-4/86	5/28-29/86	7/86	9/86
MISSOURI Eastern	Date Spkr	(06-06-85)* OLIA/Copeland					
Western	Date Spkr	03-13-86					

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
MONTANA	Date	05-22-86					
	Spkr	USMS/Smith					
NEBRASKA	Date	4/9-11/86					
	Spkr						
NEVADA	Date	(11-20-84)*					
	Spkr						
NEW HAMPSHIRE	Date	03-24-86					
	Spkr						
NEW JERSEY	Date	(06-06-85)*					
	Spkr						
NEW MEXICO	Date	02-13-86	5/86				
	Spkr	Crim/Cates					
NEW YORK							
Eastern	Date	(02-10-82)*					
	Spkr						
Northern	Date	1/29-30/86(T)	4/16 & 23/86				
	Spkr	Florio/DePue					
Southern	Date	(09-18-85)*					
	Spkr	AG/Crim-Cates					
Western	Date	01-29-86	03-05-86(T)				
	Spkr		Crim/Cates				

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
NORTH CAROLINA							
Eastern	Date	3/11-12/86					
	Spkr						
Middle	Date	09-27-86	01-10-86				
	Spkr		BJA/Vines				
Western	Date	01-13-86					
	Spkr	BJA					
NORTH DAKOTA	Date	(04-17-85)*					
	Spkr						
OHIO							
Northern	Date	03/14/86	06-05-86				
	Spkr		AAG Burns				
Southern	Date	(02-20-85)*					
	Spkr	AAG/Crim					
OKLAHOMA							
Eastern	Date	(09-04-85)*					
	Spkr						
Northern	Date	(01-16-84)*					
	Spkr						
Western	Date	1 or 2/86					
	Spkr	DAG					
OREGON	Date	(05-01-85)*					
*	Spkr						

Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
PENNSYLVANIA Eastern	Date Spkr	03-21-86	06-20-86	10-17-86			
Middle	Date Spkr	(09-24-85)* OJARS/Laver					
Western	Date Spkr	(11-18-85)* WH/Turner					
PUERTO RICO	Date Spkr	(04-19-85)*					
RHODE ISLAND	Date Spkr	01-07-86					
SOUTH CAROLINA	Date Spkr	9/14-17/86(T) jt w/state					
SOUTH DAKOTA	Date Spkr	05-09-86					
TENNESSEE Eastern	Date Spkr	(03-15-85)*					
Middle	Date Spkr	01-24-86	04-25-86				
Western	Date Spkr	02-28-86	07-03-86				

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
TEXAS							
Eastern	Date	(11/13-14/85)*					
	Spkr	Crim/Florio					
Northern	Date	(06-07-84)*	06-13-86				
	Spkr		AF/R. Hart DAAG				
Southern	Date	03-18-86	04-11-86(T)				
	Spkr						
Western	Date	1/21-22/86	02-26-86(T)	4/9-10/86	6/86	9/86	12/86
	Spkr	USMS/Smith		Crim/Cates			
UTAH	Date	2/6-7/86	03-07-86				
	Spkr		R.Hart/Turner W.H.				
VERMONT	Date	(2/14-15/85)*					
	Spkr						
VIRGIN ISLANDS	Date	02-21-86					
	Spkr	DAG					
VIRGINIA							
Eastern	Date	(02-20-85)*					
	Spkr						
Western	Date	(03-26-85)*					
	Spkr						

*Previous Meeting Held.

LAW ENFORCEMENT COORDINATING COMMITTEE MEETINGS

STATE District		MEETING DATES #1	#2	#3	#4	#5	#6
WASHINGTON Eastern	Date Spkr	5/86	06-17-86 jt w/IDAHO				
Western	Date Spkr	(12-09-85)* Crim/Barrett					
WEST VIRGINIA Northern	Date Spkr	03-12-86 OLIA/Copeland					
Southern	Date Spkr	04-29-86					
WISCONSIN Eastern	Date Spkr	(10-10-85)* ADAG/Hart					
Western	Date Spkr	04-29-86					
WYOMING	Date Spkr	1/8-10/86	6/86 Crim/ADAG				

*Previous Meeting Held.

NDAA SURVEY
LAW ENFORCEMENT COORDINATING COUNCILS

This survey is intended to quantify the perceptions of district attorneys toward Law Enforcement Coordinating Councils.

1. How often are LECC meetings held in your jurisdiction?
annually 8(13%) / 2-3 times yr 9(14%) / 4-6 times yr 21(33%) / monthly 46%) / less than 4/yr 24(37%)

1a. How often do you attend?
Always 23(41%) Occasionally 26(46%) never 7(13%)

2. Do you personally attend or do you send a representative?
Personally 34(49%)
Representative 17(25%)
Varies 18(26%)

3. Do you feel that your LECC meets more or less often than it should?
More often 3(6%)
Less often 13(25%)
Satisfactory 37(70%)

4. One of the primary stated purposes for LECCs is to promote cooperation between federal/state/local law enforcement. In your opinion, how well has your LECC achieved this goal?
Very well 18(32%) > 74%
Fairly well 24(42%)
Not very well 10(18%)
Not at all 5(9%)

5. Has your office been asked to participate in any cooperative programs through the LECC?
No 29 (50%)
Yes 29 (50%)
If yes, give examples: _____

6. Have you found the LECC a useful forum to resolve problems between your office and your U.S. Attorney?
Yes 29(53%)
No 26(47%)
Between your office and any other federal law enforcement agency?
Yes 26(45%)
No 32(55%)

QUESTIONS FROM SENATOR DeCONCINI

Law Enforcement Coordinating Committees

Q. Last year I asked you to look into the effectiveness and use of the various Law Enforcement Coordinating Committees established in each Federal District. Can you tell me how the LECCs are functioning? Are they meeting their required meeting schedules and reporting requirements? I will say that for the purpose of coordinating law enforcement activities and resources, I believe that the reporting requirement is very important. Last year, I believe we had information that many of the LECCs had met infrequently and had not submitted required reports? Can you provide for the record a schedule of LECC meetings in each district and whether the required reports have been filed?

A. Successful implementation of the Law Enforcement Coordinating Committee program continues to be one of the highest priorities of the Department of Justice. On July 12, 1985, I wrote to all the United States Attorneys (attached) and directed them to "continue to vigorously implement the LECC initiative," and to "schedule regular meetings with state, local, and federal law enforcement agencies."

The response from the United States Attorneys, especially those allocated LECC/Victim-Witness positions, has been very satisfactory. Nearly all the districts are holding yearly meetings and many meet more often. Most districts are submitting the necessary reports, subcommittees are being established, and five districts, the Western Districts of New

York, Texas, and Missouri, and the Northern District of Indiana, and California are publishing newsletters for their LECC members. A copy of the LECC meeting list is attached.

In order to create an awareness of the importance of the program, time is set aside for Senior Departmental officials to discuss LECC activities with new United States Attorneys when they come to Washington for briefings. This process has helped increase the visibility of the program. Additionally, last December we held a 1 1/2 -day training session for United States Attorneys' staff assigned LECC responsibilities. At that time the LECC staff in the Executive Office for United States Attorneys distributed a manual to the attendees which provided both a suggested format for filing the necessary reports, and overall guidance for implementing the LECC program.

The LECC program has experienced both qualitative and quantitive improvements in the last year. Much of the program improvement can be traced directly to the 47 LECC Coordinator positions allocated by Congress for half of the United States Attorney districts. The ability to hire quality staff to help the United States Attorneys administer their LECCs has made an enormous difference in the program.

The National District Attorneys Association recently surveyed their members about their perceptions of the LECC program. Seventy-four percent of the respondents said that the LECCs were achieving their goal of promoting federal, state, and local cooperation. A copy of the survey is attached for your information.

Joint Jurisdiction of Drug Cases Along the U.S./Mexican Border

Q. In conjunction with the question about the Law Enforcement Coordinating Committees, I am also concerned about the problem of joint jurisdiction of drug cases along the border. I continually hear complaints from local law enforcement officials that the Federal Government is abdicating its responsibility to prosecute attempts to smuggle drugs into the United States. Can you tell me why an attempt to smuggle drugs through a U.S. border crossing is not prosecuted as a Federal crime? What are your general guidelines in these cases? Wouldn't you agree that it puts a huge burden on local authorities to try and handle these cases which arise simply because a town is on the border? Do you have enough attorneys in the border areas to prosecute drug smuggling cases? Why don't you ask for more? To me, this is one of the Federal Government's primary responsibilities. Has any thought been given to establishing a Task Force like the successful Florida Task Force along the Southwest border? I know that we have regional task forces established, but I am talking about a full-scale, all-out effort such as we had in Florida a couple of years ago.

A. Approximately four years ago, this Administration noted a major problem in South Florida. Because that part of the country had become a major importation point for drugs, the area's resources were unable to effectively deal with the large number of drug offenses and ancillary crimes (including a large number of drug-related murders) which had suddenly appeared in that region. The creation of the South Florida Task Force - which coordinated investigative and prosecutive resources to address this problem - was a reasoned response to this situation. Still, drug smugglers did not admit defeat. Instead, they attempted to find alternate routes to channel their illegal drugs into this country. When such a shift in smuggling activities was detected, however, this Administration saw the value to be derived from utilizing ideas conceived as part of the South Florida approach as part of a nationwide drug task force program. That program - the Organized Crime Drug Enforcement Task Force Program - was proposed by

President Reagan in late 1982. Shortly thereafter, Congress enthusiastically adopted (and funded) this program.

The Southwest Border Regional Drug Task Force and the Gulf Coast Regional Drug Task Force are responsible for the areas of the country along the United States/Mexico border (viz., southern California, Arizona, New Mexico, and Texas). The men and women assigned to these task forces have done an excellent job in addressing the problem of drugs entering the United States across our border, and they are prosecuting major cases which deserve to be prosecuted federally.

Still, the Federal Government, pursuant to the Constitution of the United States, is a government of limited, enumerated powers. Unlike state and local governments, which historically have had access to the full scope of "police powers" necessary to protect their citizens, the Federal Government must demonstrate the grant of power contained in the Constitution prior to the lawful exercise of authority in an area. It is pursuant to the Federal Government's authority under the Commerce Clause that drug importation and distribution - as being a part of interstate or foreign commerce, or having a substantial and direct effect on interstate or foreign commerce - have been controlled by Congress through the enactment of the Controlled Substances Act and the Controlled Substances Import and Export Act. These Acts provide the Federal Government with concurrent jurisdiction (along with the state and local governments) in the area of drug enforcement.

Obviously, because drug enforcement is an area where the Federal Government shares its investigative/prosecutive jurisdiction with state and local governments, there are

always questions as to the proper roles these governments should play in the area of drug enforcement. These questions sometimes include, as you have queried, whether the Federal Government has, in one or more regions of the country, abdicated its proper role in handling these cases.

Every United States Attorney's Office has - and must have - individual declination policies as to the amount and type of controlled substances which will trigger federal prosecution. Although we do not publish this information, for obvious reasons, we nonetheless view such declination policies to be essential in carrying out the proper role of the Federal Government in a Federalist form of government. As Congress has chosen not to preempt state and local jurisdiction in the drug enforcement area, these governments retain authority to prosecute, notwithstanding the Federal Government's decision to prosecute, vel non. Where we choose not to prosecute, whether because of the quantity of drugs or other factors (e.g., evidentiary questions present in federal court that may not be present in state court), each United States Attorney's Office has been directed to advise the local prosecutor's office to make sure the case receives attention and does not "fall through the cracks."

Still, there are those persons who view any refusal to prosecute a drug importation case, however small, as an abdication of federal responsibility. I cannot agree with this characterization. If we were to expend federal resources to prosecute federally every person who carried even miniscule amounts of controlled substances over the border, our resources would be inadequate to undertake the truly essential federal prosecutions of persons who have organized large-scale importation and distribution networks. Likewise, the federal courts are designed to best handle

matters raising interstate or foreign concerns, whereas the state and local court systems daily handle matters of primarily local concern and they are designed, and are best utilized, to adjudicate these matters.

Although some smaller-quantity cases must, therefore, be referred to state and local prosecutors for prosecution, or are diverted from the federal criminal process in other ways, the responsibility of the Federal Government in these cases has been adequately handled. The fact that state and local governments along the border may feel that they are unfairly burdened with the overflow of these cases is more a factor of the nature of geography than it is any design of the Federal Government to abdicate responsibility and impose upon these offices. It must be remembered that the border location which is asserted as the cause of this problem was the reason for the founding of most of these cities, and that the benefits redounding to the citizens of such locales are oftentimes unfortunately balanced by a number of concomitant burdens.

You can be assured that we consider the drug problem along the Southwest border of the United States to be of such a scale as to require the direct, forceful action of the Federal Government. And we do not feel that we have abdicated our responsibilities in this area. Still, it is only natural, where there is concurrent jurisdiction, that not all cases related to drugs being smuggled across the border will be prosecuted in federal court by federal prosecutors.

Notwithstanding our comments above, the Department of Justice and the Department of the Treasury recognize the need for a comprehensive reappraisal of the Federal

Government's response to large-scale drug trafficking and the related crime problems presently existing along the border between the United States and Mexico. It is because of this recognition that the Coordinating Group of the National Drug Enforcement Policy Board has established a Southwest Border Subcommittee whose mission is to develop comprehensive policy options designed to coordinate the effective application of all federal resources to address this serious problem. In addition to the development of a Southwest border plan, the subcommittee will also provide a high-level forum for the discussion and resolution of jurisdictional coordination problems. It is the ultimate mission of the subcommittee to coordinate the development and implementation of an overall law enforcement plan for the Southwest border that involves the full spectrum of federal, state, local, and international enforcement resources.

State and Local Law Enforcement Assistance

Q. What state and local law enforcement programs are you talking about which are "least viable"? Can you submit for the record a list of programs which the Department has funded which are "least viable"? Why don't we reexamine the Department's grant and contract procedures before we abolish our system of Federal and state cooperation?

A. Although a number of innovative programs have been funded through the former Law Enforcement Assistance Administration and the present Office of Justice Programs' Bureau of Justice Assistance, ones which quickly prove to be successful are assumed by state and local governments. Others, however, which are questionable in their value often receive support beyond a reasonable period of time either because their value can't be proven or because they enjoy strong political support. These are the types of programs, such as the Regional Information Sharing Systems, that I was referring to as the "least viable law enforcement programs". Viable does not necessarily refer to the quality of the program but rather to the ability of the program to receive state and local funds support.

We consider the Bureau of Justice Assistance grant and contract procedures to be excellent.

Regional Information Sharing Systems

Q. You propose eliminating the Regional Information Sharing Systems and you propose cutting back on Federal assistance to state and local law enforcement programs. Don't you agree that cooperation between the Federal government and the state and local governments is the cornerstone of our criminal justice system? What efforts is the Department making to insure that this vital cooperative arrangement is not endangered by the cuts in this budget?

A. The Department of Justice is in full agreement with the concept of intergovernmental cooperation as a critical element of an effective criminal justice system, and with respect to the Regional Information Sharing Systems Program, fully supports the concept of state and local law enforcement exchanging information on criminal activities which cross jurisdictional boundaries. In fact, on a nationwide basis, a number of Federal enforcement offices have utilized the services of and provided support to the individual RISS projects. We do not dispute the fact that individual RISS projects provide valuable services to state and local law enforcement. However, after an investment of more than $54 million in Federal funds over a number of years, we believe the time has come for the state and local units of government which benefit from these projects to assume their costs. It should be noted that (with one minor exception) the RISS projects still receive no direct financial support from the state and local agencies that they serve, in spite of the Department's continued efforts in this direction. In this period of fiscal austerity, as the Administration and Congress address the problems associated with the Federal deficit, we think it particularly appropriate that further funding of the RISS projects be assumed by participating agencies at the state and local levels of government.

Operation SAVE: Systematic Alien Verification and Entitlement

Your 1987 budget proposal anticipates moving forward with Operation SAVE (Systematic Alien Verification and Entitlement). You are asking for $1 million to expand Operation SAVE although your written statement acknowledges you are reexamining the INS data processing and telecommunications plan. Can Operation SAVE work effectively AND protect the rights of American citizens and permanent resident aliens without an adequate data processing and telecommunications system already in place. If a permanent resident alien applies for benefits in a program covered by SAVE, but because of INS technological problems, he or she is not recorded correctly, what happens? Are the individual's benefits denied? How does the permanent resident alien go about proving his or her legal status? Wouldn't it be better to spend the $1 million this year on improving the INS data processing and telecommunications systems and then next year experiment with Operation SAVE?

The requested $1 million for the 1987 budget will serve to recoup data processing costs and expansion of the INS telecommunications network to support the addition of 20 states to the SAVE system. SAVE is effectively designed to protect the rights of American citizens and legal permanent residents. Entitlement agency personnel generally do not process American citizens through the SAVE system unless they have some reason to believe that the applicant is making a false claim to U.S. citizenship. Lawful permanent residents would be reflected as eligible through the SAVE automated system or the secondary verification process. The present data processing system and telecommunications network can support the SAVE system, given the present structure and workload.

The SAVE system is programed to indicate one of two pieces of information:

(1) legal permanent resident, or

(2) no automated record is found - institute a secondary verification.

This process is performed by an INS officer who examines the documentation in the alien's file and verifies whether or not the applicant has the appropriate status. Whenever, a legal permanent resident's record is not in the computer system, the secondary verification process follows, eliminating the risk of an improper denial of benefits.

The permanent resident alien proves his or her legal status (in most states) by showing the appropriate immigration documentation.

The $1 million would upgrade the INS telecommunications network to support the additional 20 states.

National Drug Enforcement Policy Board: A Status Report

Mr. Meese, the National Narcotics Act of 1984 established a drug enforcement policy board to coordinate all Federal drug enforcement programs. You are the Chairman of that Board. Frankly, it appears that the Board is spinning its wheels; dusting off old proposals; studying the drug threat; but not really doing much too coordinate our overall Federal effort. NNBIS goes about its business; the DEA and FBI do their thing; Customs operates its own drug interdiction programs; and Congress is working with DOD to bring them into the drug war, while the Drug Board seems to just sit on the bank and watch the stream of events pass unders its bridge.

Q: Give me three concrete examples of specific proposals to improve our drug enforcement programs that the Board has made and recommend for action and funding, if necessary?

Q: What specific coordinated drug enforcement plans will the Board put into effect in FY 1987 -- plans that are either the idea of the Board or its member agencies, not Congressional plans.

A: During the first year of operation the Policy Board: considered and reaffirmed the President's 1984 National Strategy forwarded in July 1985 to the Congress, approved a federal-wide drug seizure statistics system, and approved a system of drug crisis management to deal with drug-related international incidents. None of these proposals required Congressional action or funding, but they represent exercise of the Board's coordination function. Among other projects, the Board is currently reviewing several DoD proposals (including the proposal for an all-source intelligence center), the President's Commission on Organized Crime Report, and the serious drug trafficking along the Southwest Border.

A: Detailed coordinated drug enforcement plans for FY 1987 are in the draft stage. The National Narcotics Act of 1984 mandates that the Policy Board produce a National and International Drug Law Enforcement Strategy. The agencies are developing this strategy for presentation to the Congress late this summer.

Drug Interdiction/DOD Air Wing:

As you know, the President has signed into law, not one, but two pieces of legislation that would establish, for the first time, a new special operations drug interdiction Air Wing within the Air Force. I moved the plan through the Senate and Congressman English followed suit on the House side.

Nearly four months have gone by, waiting for the Pentagon and the Administration to comply with the law and implement the new Air Wing. I understand that the Drug Policy Board's initial opposition to the plan focused on the choice of aircraft for the new mission at DOD -- the AC-130H special operations gunship.

Congressman English and I have now crafted a compromise Air Wing plan that would substitute C-130 Penetrating Tankers for the AC-130H gunships; establish an additional seven (7) aerostat radar systems along our southern borders and in the Bahamas; and retrofit four (4) P-3A or B model Navy aircraft with APS-138, 360-degree radar for use by Customs in our drug interdiction air program. This plan has the support of the Air Force; General Tice's drug enforcement office at DOD; Secretary Taft; Secretary Chapman Cox; and others in Congress. Even the Vice President is looking favorably on our plan, I am told.

Q: Is this proposal being reviewed by the Drug Enforcement Policy Board and if not, why aren't you involved in the implementation of this concept that has already been approved twice by the President?

A: On April 30, 1986, Secretary of Defense Weinberger forwarded to the Policy Board for review the DOD proposal for fixed wing support to the drug surveillance program. We intend to examine the impact of that proposal on the other agencies and will inform the Congress of the results of our review.

Bahamas Initiatives: Role of the Drug Board

Mr. Meese, a few weeks ago, I met with the Deputy Prime Minister of the Bahamas, to discuss a number of exciting new initiatives between our two nations that could help stop drug transshipments through the Bahamas into the U.S. For example, he said that the Bahamas would be willing to put Bahamian police on Customs aircraft to allow U.S. "hot pursuit" of drug smugglers back into the Islands. He is also planning to train up to 15 Bahamian drug police at the Federal Law Enforcement Training Center in Georgia this year. He is also close to signing an important new extradition treaty with the U.S. that would allow the extradition of non-Bahamian drug smugglers destined with their drugs for the U.S. Finally, we have agreed to install another aerostat at Georgetown in the Bahamas and to sign long term leases both there and at the High Rock aerostat site.

Q: What role, if any are you and the Drug Board playing in all of this? Frankly, my impression is that the Bahamian Government doesn't know the Drug Policy Board exists nor was there much discussion of any Justice involvement.

A: A number of the initiatives which you have raised in your question are established law enforcement efforts which have taken place over a number of years. For example, you mentioned that Bahamian police would be willing to place police officers on Customs aircraft to allow U.S. hot pursuit of drug smugglers back into the Islands. The Drug Enforcement Administration, in the last four years, has had an arrangement with the Bahamian police to allow Bahamian police officers to fly in U.S. aircraft for the purpose of apprehending drug smugglers. This arrangement has proved to be very successful and both DEA and the Bahamian police appear to be extremely happy with it. Placing Bahamian police on Customs aircraft requires further study to ensure coordination with DEA's Operation BAT.

Regarding the training of Bahamian police officers, we should point out that DEA has provided training for a number of Bahamian police officers at the FLETC over the past ten years.

We have proposed a new extradition treaty with the Bahamas. There have been no formal negotiations on that issue. We do have, however, a Mutual Legal Assistance Treaty (MLAT) which has been pending with the Bahamian Government for almost a year (August 1985). This treaty would deal primarily with the means of gathering evidence from the Bahamas to use in U.S. courts and gathering U.S. evidence to be used in Bahamian courts. This treaty would also have a section which would deal with bank secrecy in the Bahamas which would allow the U.S. access to Bahamian bank records in specified criminal matters. We expect to begin negotiations on the extradition treaty when the MLAT is signed.

The second aerostat at Georgetown in the Bahamas has been the subject of a number of conversations and meetings involving the Office of the Vice President, Department of Defense, and the Customs Service. Your question about the role the Drug Policy Board plays in all of this is a very good one. Most of these issues have been operational issues on which the Policy Board receives information and reports from the respective agencies involved. For example, the aerostat issue would fall under the development of an

64-730 0 - 87 - 5

overall interdiction policy which the Board has been working on. Additionally, the Bahamian police officers' training would also fall under the general law enforcement policy which has encouraged U.S. training of foreign police officers. Most of our agencies provide such training and have for some years. The Department of Justice has been actively negotiating the Mutual Legal Assistance Treaty for almost two years that the treaty has been pending with the Bahamian Government. Additionally, the Justice Department currently has several investigations dealing with drugs out of the Bahamas, and we coordinated and worked with the Commission on Public Corruption in 1984. It is not the role of the National Drug Enforcement Policy Board to deal directly with any foreign government. That role correctly belongs to the State Department. The role of the Policy Board is to develop and coordinate United States drug policy nationally and internationally. Many of the areas that you raise normally fall into operational management at the law enforcement level with which the Drug Policy Board does not become involved. We support completely better cooperation with the Bahamas in this important area and we believe that this cooperation should be carried out by the established law enforcement agencies that deal with the Bahamas on a day-to-day basis.

Southwest Border Drug Task Force:

Mr. Meese, a few weeks ago, five Senators joined me in a letter to the President, calling on him to establish a Southwest Border Drug Enforcement Task Force along the lines of the South Florida drug task force of 1982. Senator Domenici; Senator Wilson; Senator Bingaman; Senator Cranston; and Senator Bentsen all share my concern that the drug trafficking threat has become so great along the southwest border that such a task force is crucial to mobilizing Federal, State, local, and other drug enforcement resources to fight the drug threat.

Q: You have been to Mexico recently and are aware, I'm sure, of this growing drug menace in the southwest. Would you support the formation of such a Task Force along the southwest border and if not, why not?

A: The drug enforcement agencies are concerned about the drug trafficking threat from Mexico and along the Southwest Border. The Policy Board's Coordinating Group has established a subcommittee chaired by Francis A. Keating II, Assistant Secretary of the Treasury, to develop recommendations and a plan of action for Mexico and the Southwest Border. Creating a formal task force is one option they may consider; ensuring the coordination of law enforcement and diplomatic programs related to this drug threat is the subcommittee's paramount concern.

Organized Crime Commission Report:

The President's Commission on Organized Crime Final Report makes some recommendations that many of us in Congress have been promoting for nearly four years -- without much help from the Administration. I am talking specifically about the need for improved, better-coordinated intelligence and greater use of the military in the drug war. There were others but these were two recommendations that stand out.

Q: What specific steps do you plan to take to implement these and other findings of the Commission and when can we expect those steps to be taken?

A: The 71 PCOC recommendations cover a broad range of issues. The NDEPB's Coordinating Group has been reviewing them and will report their findings to the Policy Board this summer. Where feasible, PCOC recommendations will be implemented. It is expected that some of the recommendations will be embraced as part of the Board's National and International Drug Law Enforcement Strategy.

Drug Interdiction: The Stepchild of Drug Enforcement

Mr. Meese, there is no secret within the law enforcement community that this Administration places drug "interdiction" at the bottom of the totem pole in terms of our overall drug enforcement strategy. I have seen you on television many times outline our main drug enforcement programs and drug interdiction is hardly ever mentioned. I believe, as do others, that we must have at least a four-pronged attack on drugs: (1) education; (2) investigations of major trafficking networks; (3) source country eradication; and (4) interdiction at the borders. If one of these legs falls off "the stool", the stool falls down, in my opinion.

Q: Why is this Administration so negative against the "interdiction" component of our Drug War, as reflected in a series of bad budgets for Customs and Coast Guard?

A: I disagree with your conclusion that the Administration places a lesser degree of emphasis on drug interdiction than on other drug enforcement strategies. The Vice President continues to run the National Narcotics Border Interdiction System. Military support to drug interdiction is much greater and has been encouraged by legislative changes and Congressional interest. The Policy Board has established a special subcommittee to develop policy and strategy on the Southwest Border.

I agree with your observation that the drug enforcement strategy must maintain a balanced approach. This Administration will continue to support interdiction efforts to maintain a balance in our overall drug enforcement strategy.

Mexico: Problem of Drugs Getting Worse

Mexico is rapidly becoming a major drug source and transshipment country, feeding into the U.S. Nearly 30% of the cocaine coming into the United States, comes in through Mexico; over one-third of the heroin market in the U.S. is supplied by Mexico; and Mexico is in a dead heat with Colombia as the No. 1 supplier of marijuana to the U.S.

The Camarena murder and the killing of Customs officer Glen Miles are further evidence that the southwest border is becoming a "powder keg" waiting to go off.

Q: What specific steps are you recommending, both as Attorney General and as Chairman of the Drug Board, to address the growing Mexican drug threat to our nation? Be specific.

A: As mentioned above, the Policy Board's Coordinating Group has established a subcommittee to develop policy and strategy related to Mexico and the Southwest border. Furthermore, I have taken a personal interest in leading multi-agency delegations to Mexico to foster improved cooperation. We are making progress in many areas of mutual concern, including the flow of fugitives, arms, drugs and stolen property across our border. Specific plans of action will be developed in the near future. These plans will be reflected in the Policy Board's National and International Drug Law Enforcement Strategy. Should legislative or appropriations proposals be adopted by the Policy Board, they will be forwarded to the Congress for consideration.

Anti-Terrorism Training Project at Treasury

Q. Mr. Meese, as you know, last year I introduced legislation, S. 1499, that would, among other things, establish mandatory antiterrorist training for all Federal law enforcement officers and establish a training academy at the Federal Law Enforcement Training Center at Glynco, Georgia. The FBI initially opposed the bill, but FBI testified before the Appropriations Committee in Sierra Vista, Arizona that many of the bill's provisions made sense. I now understand that the Treasury Department has initiated an antiterrorist training program at FLETC, after consultation with Justice. Cutting through the turf battles for a moment, doesn't it make sense to train our Customs, INS, Coast Guard, Secret Service, and other Federal officers to combat terrorism, to supplement--not supplant--the role that the FBI plays in domestic terrorism?

A. Federal law enforcement officers should be well-trained in their assigned areas of responsibility. Providing antiterrorism training is and should remain the responsibility of the DOJ and the FBI.

Attached is a description of FBI terrorism and related training.

TERRORISM AND RELATED TRAINING FURNISHED TO LOCAL POLICE COMMUNITY AND MILITARY AND FEDERAL AGENCIES FISCAL YEAR (FY 85) AND FISCAL YEAR 1986 (FY 86)

The FBI, during the past two fiscal years has conducted a myriad of terrorism-related training courses and conferences for both the local law enforcement community and representatives of both the military and other federal agencies. These conferences were conducted both at the FBI Academy, and off-site. It is projected that by the end of FY 86, a total of 6319 individuals will have participated in FBI-sponsored training. The following outline details the number of local police and other federal and military employees who received FBI-sponsored training in terrorism and related areas during FY 85 and FY 86 and who are scheduled to receive such training during the remainder of FY 86. Due to the variety of training courses and multiple Bureau units involved in this training, training is listed by sponsoring FBI division and units.

A. TRAINING DIVISION

The FBI Academy's Special Operations and Research Unit (SOARU) provided terrorism-related training to approximately 1239 police officials both at the FBI Academy and regional schools throughout the U.S. Courses of instruction included hostage negotiation and crisis management. An additional 330 military officials and representatives of other federal agencies also received similar type training. It is estimated than an additional 15 law enforcement officials will receive terrorism related training during the remainder of FY 86.

In addition to the above specialized training, it is estimated that 1360 law enforcement officers attending the FBI National Academy Program received training in the area of crisis management with an additional 216 National Academy students successfully completing a three credit (44 hour) course on the Theory and Politics of Terrorism. An additional 50 chief executive officers representing this nation's largest cities received a comprehensive overview of international terrorism while attending the FBI's National Executive Institute (NEI). Material in the NEI was presented by both FBI and external resources.

B. HOSTAGE RESCUE TEAM (HRT)

The FBI's HRT provided counterterrorism training both at the FBI Academy and in the field to approximately 95 police officials and 54 military and other federal agency personnel. It is projected that an additional 131 police officials and 20 military and other federal agency personnel will receive counterterrorism training during the remainder of FY 86.

C. LABORATORY DIVISION

The FBI's Bomb Data Center provided specialized training to approximately 1523 police officials. This training was conducted at the FBI Academy, regional sites, and at the FBI-administered Hazardous Devices School (HDS), Huntsville, Alabama. It included such schools as Bomb Squad Commanders Seminar; Basic HDS; Refresher HDS; Bomb Technicians Seminars; Bomb Investigators Field Schools and a one day Recognition Class. It is also estimated that 438 military and representatives from other federal agencies received this specialized training. It is estimated that 511 police officials and 111 military or other federal agency personnel will receive similar training during the remainder of FY 86.

For further clarification, the following background information is being supplied regarding the nature and scope of the training provided by the Bureau's Bomb Data Center.

The FBI-administered HDS is the only civilian bomb technicians course in the U.S. Its charter is to provide basic and refresher training to public safety officers who have primary render-safe responsibility with respect to improvised explosive devices. State and local public safety agencies have this bomb disposal responsibility. Federal officers who have a legitimate investigative or training interest in bombing matters are trained. This clientele would include the FBI, Bureau of Alcohol, Tobacco and Firearms (BATF), Secret Service and Central Intelligence Agency (CIA). (All BATF bomb technicians receive their training at the Basic HDS). Since 1971, HDS has graduated over 3,000 bomb technicians active at present time. A secondary response capability is provided by approximately 500 U.S. Army Explosive Ordinance Disposal (EOD) personnel within the continental U.S.

In addition to the training by the Bomb Data Center, in FY 85 and FY 86, the Laboratory Division also conducted a series of training courses with direct application to the terrorism field. Approximately 202 police officials received training at the FBI Academy in areas such as Laboratory Examination in Arson Matters; Police Arson School; Police Arson Crime Scene; Bombing Crime Scene and Instrumental Analysis of Explosives. An additional 19 military or representatives from other federal agencies received similar training. It is estimated that an additional 203 police officials will receive this training during the remainder of FY 86.

D. CRIMINAL INVESTIGATIVE DIVISION (CID)

The Terrorism Section, CID, provided training to 23 police officials in a Domestic Terrorism course conducted at the FBI Academy during the period 7/14-19/85. An additional 80 representatives of other federal agencies participated in either the Nuclear Terrorism Conference during the period 12/15-20/85 or the joint FBI/State Department Seminar on Terrorism during the period 10/4-5/84. Both of these working conferences were conducted at the FBI Academy and participants included representatives the U.S. State Department, Central Intelligence Agency, Department of Energy, Department of Defense, and Department of Treasury. It is projected that an additional 19 local law enforcement officials will participate in a Domestic Terrorism Conference at the Academy in FY 86, and an additional 10 representatives from other federal agencies are scheduled to participate in either a Mid-East Terrorism or Basic Terrorism Conference at the FBI Academy in FY 86. An additional 22 representatives from foreign nations participated in a terrorism-related working conference at the FBI Academy during the period 9/17-20/85.

Federal Bureau of Investigation Drug Intelligence System

Q. Mr. Meese, the FBI, I understand, is requesting $8.5 million next year for a joint effort with DEA to develop a computerized drug intelligence system to support the interdiction of vessels and airborne drug traffic.

You may not know this, but the Customs Service for the past two years has been moving ahead on the development of similar air and marine drug command, control, communications, and intelligence (C-31) centers at March Air Force Base in California and Miami, Florida with plans to construct such centers over the next two years. There are also plans at Customs for expansion of joint marine drug intelligence centers in Houston, Texas and New Orleans. Why are the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) apparently duplicating what is already taking place at Treasury? Have you coordinated your plans for this new system with Customs, and if not, why not? What are your plans for the El Paso Intelligence Center (EPIC) if you are embarking on a new plan for this intelligence system?

A. The FBI and DEA are not duplicating efforts by the Customs Service to develop air and marine drug command, control, communications and intelligence centers. In fact, the FBI has maintained a very close working relationship with the Customs Service to avoid duplication of efforts and to ensure systems compatibility.

The primary center for drug intelligence information to support interdiction is the El Paso Intelligence Center (EPIC). Nine Federal agencies including the FBI, DEA, and U.S. Customs Service, participate at EPIC. During fiscal year 1985, the FBI began a major project to convert EPIC into a state of the art center for tactical intelligence to

support drug interdiction. The specific project goals include: reducing the time required to process inquiries; avoiding missed opportunities concerning perishable information; providing patterns and trends to allow Agents to identify suspect violators; providing a fully integrated data base for the analysis of multiagency intelligence; providing an institutional data base; and providing more timely and accurate intelligence information for decision making. EPIC, as a multiple agency center, has no command and control authority.

The Customs Service centers, however, will direct their assets during interdiction operations. The identification of suspect aircraft and vessels will be provided by EPIC. Thus, the Customs Service centers will be complemented by the enhanced EPIC, and interdiction efforts will be instituted with the best possible intelligence.

Regional Information Sharing System Program

Q. The Administration is proposing to eliminate the Regional Information Sharing System program once again, as it has for the last five years or more. While the RISS program is small with a total budget of $9.9 million, the individual RISS projects have had some very impressive successes. One example is the RISS program located in Nashville, Tennessee. During calendar year 1985, agencies using equipment on loan from this program, made 572 narcotics arrests, resulting in over $380 million in drug seizures.

Given the magnitude of our Nation's drug problem, and the Administration's ongoing effort to wage a war on drugs, why are you proposing to eliminate a program that with a small amount of money has had some rather huge successes?

A. While I am sure loans of equipment, such as cameras and recorders, are of value to the local agencies, I have some doubt the entire results of the investigations can be attributed to the loan program.

This is not to suggest that the efforts of the RISS projects do not benefit state and local law enforcement agencies. On the contrary, everything I have heard indicates they do, and that leads me to your question -- why are we "proposing to eliminate the Regional Information Sharing Systems Program once again?"

The short answer is we are not.

What we are striving to do is to adhere to the principle underlying the creation of the RISS program over a decade ago, and that is to see that they get funding at the federal level long enough for them "to get on their feet" and develop a

program where by those who benefit from their efforts would pay for them. Thus far RISS has not accomplished that objective. To give them one more chance, we recently agreed to allow them to use any part of their current funds to develop alternate funding.

There is another reason underlying our position, and that is our need to establish priorities to meet our law enforcement responsibilities at the federal level.

Today we are suffering enormous casualties in lives and health as the result of increased use of illegal drugs; for that reason I have made drug abuse the number one criminal justice priority of the Department of Justice. In addition, I feel we must at a minimum attack organized crime, protect our national security and prosecute those who violate our civil rights. With the ever tighting budgetary restraints, I hope you understand that we must select with care among the very many competing programs for limited federal funding, and I feel the resources dedicated to the RISS projects can be used more effectively for other federal programs.

QUESTIONS FROM SENATOR MATHIAS

Criminal Enforcement of the Trademark Counterfeiting Act of 1984.

Q. The Department of Justice has now had over one year of experience prosecuting trademark counterfeiters under the October 1984 amendments to Title 18. Could you describe what actions the Department has taken under these new laws, and whether these changes have been effective in enhancing protection for trademark owners.

A. As recently reported to the Senate Appropriations Committee, during the latter part of 1985 and early 1986, the General Litigation and Legal Advice Section of the Criminal Division began evaluating the nature and scope of criminal activity in the field of intellectual property, particularly counterfeit trademark problems. Although the October 1984 amendments covered counterfeit trademarks in the public and safety as well as general consumer protection areas, at the outset the Department made an effort to identify for investigation and prosecution any criminal counterfeit trademark cases in which substandard goods would be a threat to public health or safety. We focused our attention particularly on the automotive parts industry, in the aerospace and aircraft parts industry, and on the chemical (including pharmaceutical) industry. With the exception of a case involving counterfeit birth control pills, we have, thus far, been unable to identify any such cases warranting criminal investigation and prosecution under the new Trademark Counterfeiting Act of 1984 ("TCA"). Moreover, a review of the matters pending in the United States Attorney's offices in fiscal year 1985 shows that no cases involving public health and safety have been prosecuted during the first year since passage of the TCA.

The Department's efforts are not limited to public health and safety cases. We have communicated to various industry groups the Department's willingness to investigate and prosecute any appropriate counterfeit trademark case. However, relatively few counterfeit trademark cases have thus far been opened in the United States Attoneys' offices. It may well be that because of the newness of the TCA, companies are continuing to rely heavily on their civil remedies to police their trademarks, not only in fact situations which are not criminalized by the TCA, but also in those fact situations which are criminalized.

Q. Have these amendments provided U.S. Attorneys with the necessary tools to effectively prosecute trademark counterfeiters?

A. Thus far, in every case that has been brought to the Department's attention, the criminal provisions of the TCA have provided an effective vehicle to prosecute any trademark counterfeiters whose conduct has warranted such criminal treatment.

Q. What guidelines have been give the U.S. Attorneys concerning prosecutions under these amendments?

A. As part of its Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress, the Department has published the attached description of the TCA.

CHAPTER XV. TRADEMARK COUNTERFEITING

(H.J. Res. 648, pp. 342-347)

Summary

Chapter XV creates the Trademark Counterfeiting Act of 1984, which amends title 18, United States Code, by adding a new offense of trafficking in goods or services using counterfeit trademarks. This provision should be used with discretion, not as a general substitute for civil remedies under the Lanham Act.

Analysis and Discussion

New section 2320 of title 18, United States Code, makes it a felony for a person intentionally to traffic, or attempt to traffic, in goods or services, knowing that he is using a counterfeit trademark. The penalties upon conviction are up to five years' imprisonment and a $250,000 fine for individuals, and a fine of up to $1,000,000 for non-individual defendants. Upon a second conviction, the penalties are up to 15 years' imprisonment and a $1,000,000 fine for an individual, and, for non-individuals, a $5,000,000 fine. 1/ In addition, the court may order destruction of the counterfeit articles.

This section is intended to address the proliferation of trademark piracy, which has primarily involved the clandestine manufacture and distribution of imitations of well-known trademarked merchandise such as wearing apparel, jewelry, watches, computers, automobile parts, and medical equipment. The victims of such fraudulent activity include businesses in the legitimate chains of distribution who have lost sales and profits, as well as ultimate consumers of the phony merchandise or services.

In addition to identical or virtually identical counterfeits, the statute prohibits unauthorized use of another's registered trademark in connection with items or services which are of a class or kind for which the genuine trademark is registered. Thus, if a trademark was registered for use on jeans and other wearing apparel, and the trademark owner to that point had made only jeans, it would be a violation of the statute to knowingly and intentionally use counterfeits of the registered trademark on shirts, provided that such use would be likely to cause confusion, mistake, or deception of purchasers. In this regard, it is the imitation of registered trademarks which the statute prohibits rather than simply the imitation of someone else's goods or services. However, the unauthorized use of another's trademark on goods or services must be such that the

---

1/ See the references to the new fine levels which appear in the discussion concerning chapter IIA, above.

items would be likely to cause confusion, mistake, or deception of purchasers.

Schemes discovered and abated before the offending merchandise is acutally shipped, or before the services are provided, can be prosecuted under the "attempt" language in the statute, as well as under the general conspiracy statute, 18 U.S.C. 371. When the scheme involves importations, there are also certain customs-related statutes which may be employed, such as 18 U.S.C. 545 (concerning importations contrary to law), in conjunction with 15 U.S.C. 1124.

The new Trademark Counterfeiting Act also provides that all defenses and limitations on remedies which would be applicable in a civil action under the Lanham Act (15 U.S.C. 1051 et seq.) for trademark infringement are applicable in a criminal prosecution. The defenses under the Lanham Act can be found at 15 U.S.C. 1115, and limitations on remedies can be found at 15 U.S.C. 1114, 1116, 1117, and 1118. The Lanham Act defenses recognize that there may be circumstances in which the registered trademark may be challenged because of some infirmity in its use. Such defenses include, for example, that the registered trademark was being used in furtherance of antitrust activity. As a practical matter, however, this should have limited impact on prosecutions for deliberate counterfeiting activity. Under case law interpreting the Lanham Act, collateral defenses do not excuse deliberate counterfeiting activity when it is likely to cause confusion, mistake, or deception. Thus, a registered trademark which is in use may not be legitimately challenged by duplicating both it, as well as the appearance of the legitimate goods on which it is used, in order to create confusion, mistake, or deception.

It should be kept in mind that the new statute is directed only at unauthorized manufacture, rather than unauthorized distribution of goods made by one who had authority to use the registered trademark (e.g., a licensee). However, as the legislative history makes clear, the defendant has the burden of proof that the suspect articles were made by one who had authority to use the mark.

The relevant portion of the Joint Senate and House Report on the Trademark Counterfeiting Act of 1984 is reprinted in 130 Cong. Rec., pp. H 12076 - H 12083 (October 10, 1984).

Policy Considerations

This provision is not intended to criminalize every trademark infringement for which remedies may exist under the Lanham Act. It is intended to deal only with those who seek to "palm off" counterfeits which a person of average intelligence could reasonably believe were made or produced by the registered trademark holder. Thus, the use of the same trademark name, for example, but in a manner and configuration which patently distinguished

the allegedly infringing articles from those of the registered trademark holder so that a person would not reasonably be deceived, would be more appropriately dealt with by civil remedies under the Lanham Act.

Criminal Division Contact

Martin Carlson (724-7035) or Beneva Weintraub (724-7081) of the General Litigation and Legal Advice Section.

Criminal Enforcement of the Copyright laws

Q. One year ago, the Subcommittee on Patents, Copyrights and Trademarks held a hearing on criminal enforcement of the copyright laws. Please provide an update on enforcement actions taken under these statutes in the past year.

A. According to statistics compiled by the Executive Office of United States Attorneys forty criminal copyright prosecutions were instituted in fiscal year 1985. These figures represent an increase of approximately eighteen percent over fiscal year 1984 and illustrate the Department of Justice's continued commitment to effective law enforcement in this area. This increased activity also reflects efforts by the Department to extend the protection of the criminal copyright laws to new and emerging technologies. For example, within the past year the United States States Attorney's Office for the Northern District of California successfully prosecuted a case involving the importation and distribution of infringing copies of copyrighted computer programs. Similarly, the United States Attorney's Office for the Northern District of Georgia prosecuted five cases in 1985 involving copyright infringement of video games. These prosecutions resulted in four felony convictions under the criminal copyright laws.

Undercover operations affecting churches and other religious organizations have been the subject of a great deal of discussion over the last few months. What are the Department's current criteria for determining if such an undercover investigation should be commenced?

On March 5, 1984, the Attorney General signed guidelines governing INS undercover operations to take effect March 19, 1984. These guidelines provide in part for an Undercover Operations Review Committee consisting of enforcement employees and such other appropriate employees of the INS as designated by the Commissioner, as well as attorneys from the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division. The Committee is chaired by the Associate Commissioner for Enforcement as the Commissioner's designee.

Undercover operations involving an investigation of activities of a religious organization fall within the category of undercover operations that must go before the Undercover Operations Review Committee.

In reviewing the application, the Committee carefully assesses the contemplated benefits of the undercover operation. The following criteria among others are considered:

* The risk of harm to private individuals or undercover employees;
* The risk of financial loss to private individuals and businesses and the risk of damage liability or other loss to the government;

* The risk of harm to reputation;
* The risk of harm to privileged or confidential relationships;
* The risk of invasion of privacy;
* The suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the undercover operations;
* Entrapment issues;
* The corrupt nature of the activity is reasonably clear to potential subjects;
* There is reasonable indication that the undercover operation will reveal criminal activities, and;
* The nature of any inducement is not unjustifiable in view of the character of the criminal activity in which the individual is invited to engage.

Which officials have the authority to approve such as investigation?

The authority to approve an undercover operation concerning the activities of a religious organization would be the responsibility of the Commissioner or the Associate Commissioner for Enforcement.

Has the Department authorized government agents or informants to impersonate members of the clergy as part of any undercover operation? Under what circumstances would the Department authorize one of its agents or informants to impersonate members of the clergy as part of any undercover operation? Under what guidelines would such an operation take place? Please provide a copy of any such guidelines.

To date INS has not authorized agents or cooperating private individuals to impersonate members of the clergy. If such a request were received, the Undercover Operations Review Committee would review the entire application including the criteria stated previously.

A copy of the Attorney General's Guidelines on INS Undercover Operations dated March 5, 1984 is attached.

Office of the Attorney General
Washington, D. C. 20530

ATTORNEY GENERAL'S GUIDELINES ON

INS UNDERCOVER OPERATIONS

The following guidelines on use of undercover operations by the Immigration and Naturalization Service are issued under authority of the Attorney General as provided in 28 U.S.C. 509, 510, 533, and 8 U.S.C. 1103.

		PAGE
I.	INTRODUCTION	3
	Definitions	3
II.	GENERAL AUTHORITY	3
III.	AUTHORIZATION OF UNDERCOVER OPERATIONS	4
IV.	CATEGORIES OF UNDERCOVER OPERATIONS	4
	A. Undercover Operations which Must Be Authorized by the Commissioner of the INS with Concurrence of the Assistant Attorney General for the Criminal Division	4
	B. Undercover Operations which Must Be Authorized by the Appropriate Regional Commissioner	6
	C. Undercover Operations which May Be Approved by the Appropriate District Director or Chief Patrol Agent	7
	D. Emergency Authorization	8
V.	APPROVAL PROCEDURES	8
	A. Approval by Central Office (Undercover Operations Review Committee and Commissioner or Associate Commissioner for Enforcement) with Concurrence of United States Attorney or Strike Force Chief When Sensitive Circumstances Are Present	8

B. Applications to the Central Office 9

C. Undercover Operations Review Committee 10

D. Approval by the Commissioner 12

E. Duration of Authorization 13

F. Authorization of Participation in "Otherwise Illegal" Activity 13

G. Authorization of the Creation of Opportunities for Criminal Activity 15

H. Authorization of Investigative Interviews that Are Not Part of an Undercover Operation 16

VI. MONITORING AND CONTROL OF UNDERCOVER OPERATIONS 16

A. Continuing Consultation with United States Attorney or Strike Force Chief 16

B. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances 17

C. Annual Report of Undercover Operations Review Committee 17

D. Preparation of Undercover Employees 18

E. Review of Undercover Employee Conduct 18

F. Deposit of Proceeds; Liquidation of Proprietaries 19

VII. RESERVATION 19

I. INTRODUCTION

The Immigration and Naturalization Service's (INS's) use of undercover operations is a lawful and essential technique for the detection and investigation of alien-smuggling conspiracies, fraudulent document offenses, and other violations of federal law within the jurisdiction of the INS. Since this technique inherently involves an element of deception and occasionally requires a degree of cooperation with persons whose motivation and conduct are open to question, it should be carefully considered and monitored.

Definitions

A "cooperating private individual" is a person who is not employed by the INS but whose activities are directed by an INS employee.

"Otherwise illegal activity" is activity that would constitute a crime under federal, state, or local law if engaged in by a person acting without approval or authorization of an appropriate Government official.

An "undercover employee" is any employee of the INS -- or employee of a federal, state, or local law enforcement agency working under the direction and control of the INS in a particular investigation -- whose relationship with the INS is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee or cooperating private individual is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the INS which is used in connection with an undercover operation when the entity's relationship with the INS is not generally acknowledged.

II. GENERAL AUTHORITY

The INS may conduct undercover operations pursuant to these guidelines when such operations advance the enforcement of criminal statutes assigned to the investigatory jurisdiction of the INS or when otherwise appropriate to carrying out the Service's investigative function.

Under this authority, the INS may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate

a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

III. AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of three categories: (1) those undercover operations which must be authorized by the INS Commissioner with the concurrence of the Assistant Attorney General for the Criminal Division; (2) those which must be authorized by the appropriate Regional Commissioner; and (3) those which must be approved by the appropriate District Director or Chief Patrol Agent. In general, the graver the risk of harm or intrusiveness, the higher the approval level required. Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible unless such avoidance would unduly interfere with obtaining evidence in a timely and effective manner.

IV. CATEGORIES OF UNDERCOVER OPERATIONS

A. Undercover Operations which Must Be Authorized by the Commissioner of the INS with Concurrence of the Assistant Attorney General for the Criminal Division

Subject to the emergency authorization procedures set forth below, undercover operations involving sensitive circumstances must receive prior approval of the Commissioner of the INS or the Associate Commissioner for Enforcement with the concurrence of the Assistant Attorney General for the Criminal Division or his or her designee. For the purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

(1) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a high foreign government official, the activities of a religious or political organization, or the activities of the news media;

(2) An undercover operation will be conducted substantially outside the United States (an operation is not conducted substantially outside the United States if its only extraterritorial conduct will consist of contacts within immediate border areas with principals when such contacts are necessary to maintain the credibility, cover, or safety of the undercover employee or cooperating private individual);

(3) An undercover employee or cooperating private individual will be a major participant in the scheme to move or transport aliens illegally across an international border;

(4) An undercover employee or cooperating private individual, during the undercover operation, will make false or misleading representations about the activities of a third person who is not involved in and does not share any guilt for the activities which are the subject of the investigation, and there is a reasonable possibility that the false or misleading representations may cause significant embarrassment or physical or financial harm to the third person;

(5) An undercover employee or cooperating private individual will engage in any otherwise illegal activity which would be proscribed by federal, state, or local law as a felony or which would be otherwise a serious crime -- except for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens;

(6) An undercover employee or cooperating private individual will seek to supply an item or service, other than the supplying of documents, that would be reasonably unavailable to criminal actors but for the participation of the Government;

(7) An undercover employee or cooperating private individual will run a significant risk of being arrested for other than minor traffic violations but will nevertheless seek to continue in an undercover capacity;

(8) An undercover employee or cooperating private individual will be required to give a sworn statement or testimony in any judicial proceeding in an undercover capacity;

(9) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his or her lawyer;

(10) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant

risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

(11) An undercover employee or cooperating private individual will make a request for information to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

(12) An undercover employee or cooperating private individual will make a request for information to a member of the news media concerning any individual with whom the newsperson is known to have a professional or confidential relationship;

(13) There may be significant risk of violence or physical injury to an individual or a significant risk of financial loss to an innocent individual;

(14) The undercover operation will require the use of appropriated funds to establish, acquire, or operate a proprietary; or

(15) The undercover operation will require the deposit of appropriated funds or proceeds generated by the undercover operation in banks or other financial institutions. (Absent statutory authorization, such proceeds must be promptly deposited in the United States Treasury and may not be used to offset the expenses of the undercover operation. Proceeds may be deposited in banks or other financial institutions as part of a process leading to the prompt deposit of such funds in the Treasury.)

B. Undercover Operations which Must Be Authorized by the Appropriate Regional Commissioner

An undercover operation involving activity in more than one region but not involving a sensitive circumstance listed in paragraph A, above, can be authorized, extended, renewed, or modified by the appropriate Regional Commissioner with notification to the Associate Commissioner for Enforcement. In order to authorize, extend, renew, or modify such an undercover operation, the appropriate Regional Commissioner must approve a written proposal that:

(1) Summarizes the proposed undercover operation and shows that there are facts or circumstances that reasonably indicate that a federal crime, which is within the investigatory jurisdiction of the INS,

has been, is being, or will be committed;

(2) Shows why the proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; included should be a statement of what prior investigation has been conducted and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(3) Indicates that the undercover operation will be conducted with the minimal intrusion which is consistent with the need to collect the evidence or information in a timely and effective manner;

(4) Indicates that there is no present expectation of the occurrence of any of the circumstances listed in paragraph A, above;

(5) Indicates that any foreseeable participation by an undercover employee or cooperating private individual in otherwise illegal activity which can be approved by the Regional Commissioner on his or her own authority (i.e. the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens) is justified by the factors noted in paragraph V(F)(1), below; and

(6) Includes a statement that the District Director or the Chief Patrol Agent or his or her designee contacted the affected United States Attorney or Strike Force Chief, or his or her designee, and sets out fully the position of the Office of the United States Attorney or Strike Force Chief.

C. Undercover Operations which May Be Approved by the Appropriate District Director or Chief Patrol Agent

The appropriate District Director or Chief Patrol Agent may authorize the establishment, extension, renewal, or modification of all undercover operations which do not require approval by the Commissioner or Regional Commissioners. In order to authorize, extend, renew, or modify an undercover operation, the appropriate District Director or Chief Patrol Agent must approve a written proposal which includes all the information required by paragraph B, above.

D. Emergency Authorization

Notwithstanding any other provision of these guidelines, any District Director or Chief Patrol Agent who reasonably determines that:

(1) an emergency situation exists, requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm; and

(2) there are grounds upon which authorization could be obtained under these guidelines,

may approve the establishment, extension, renewal, or modification of an undercover operation provided that a written application is submitted in accord with the appropriate review procedures established elsewhere in these guidelines within 48 hours after the undercover operation has been established, extended, renewed, or modified.

In such an emergency situation, the District Director or Chief Patrol Agent shall attempt to consult by telephone with the United States Attorney or Strike Force Chief. If the proposed operation involves a sensitive circumstance specified in paragraph A, above, the District Director or Chief Patrol Agent shall also attempt to consult by telephone with the Associate Commissioner for Enforcement, and the Central Office shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the operation if emergency authorization is granted. In the event that the subsequent written application for approval of an undercover operation involving a sensitive circumstance is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Commissioner who shall inform the Deputy Attorney General.

V. APPROVAL PROCEDURES

A. Approval by Central Office (Undercover Operations Review Committee and Commissioner or Associate Commissioner for Enforcement) with Concurrence of United States Attorney or Strike Force Chief When Sensitive Circumstances Are Present

The Commissioner of the INS or the Associate Commissioner for Enforcement must approve the establishment, extension, renewal, or modification of an undercover operation if there is

D. Emergency Authorization

Notwithstanding any other provision of these guidelines, any District Director or Chief Patrol Agent who reasonably determines that:

(1) an emergency situation exists, requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm; and

(2) there are grounds upon which authorization could be obtained under these guidelines,

may approve the establishment, extension, renewal, or modification of an undercover operation provided that a written application is submitted in accord with the appropriate review procedures established elsewhere in these guidelines within 48 hours after the undercover operation has been established, extended, renewed, or modified.

In such an emergency situation, the District Director or Chief Patrol Agent shall attempt to consult by telephone with the United States Attorney or Strike Force Chief. If the proposed operation involves a sensitive circumstance specified in paragraph A, above, the District Director or Chief Patrol Agent shall also attempt to consult by telephone with the Associate Commissioner for Enforcement, and the Central Office shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the operation if emergency authorization is granted. In the event that the subsequent written application for approval of an undercover operation involving a sensitive circumstance is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Commissioner who shall inform the Deputy Attorney General.

V. APPROVAL PROCEDURES

A. Approval by Central Office (Undercover Operations Review Committee and Commissioner or Associate Commissioner for Enforcement) with Concurrence of United States Attorney or Strike Force Chief When Sensitive Circumstances Are Present

The Commissioner of the INS or the Associate Commissioner for Enforcement must approve the establishment, extension, renewal, or modification of an undercover operation if there is

a reasonable expectation that any of the circumstances listed in paragraph IV(A) may occur.

In such a case, the appropriate District Director or Chief Patrol Agent shall submit the application to the INS Central Office through the appropriate Regional Office. See paragraph B, below. The Central Office may either disapprove the application or recommend that it be approved. In cases in which the Central Office recommends approval, the application shall be forwarded to the Undercover Operations Review Committee. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Commissioner or the Associate Commissioner for Enforcement. See paragraph D, below. The Commissioner or Associate Commissioner for Enforcement may approve or disapprove the application.

B. Applications to the Central Office

(1) Each application to the Central Office from a District Director or Chief Patrol Agent recommending approval of the establishment, extension, renewal, or modification of an undercover operation involving circumstances listed in paragraph IV(A) shall be made in writing and shall include, with supporting facts and circumstances:

(a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating private individuals who will assist in the operation; a description of the criminal enterprise under investigation, and any individual known to be involved; and a statement of the period of time for which the undercover operation would be maintained;

(b) An inclusion of the information required by paragraph IV(B)(1)-(3) and a statement as to why it is believed traditional investigative techniques will not achieve the desired results;

(c) A statement concerning which circumstances specified in paragraph IV(A) are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including, for any foreseeable participation by an undercover employee or cooperating private individual in any otherwise illegal activity which would be proscribed by federal, state, or local law as a felony or which would be otherwise a serious crime -- except for the making of false representations to third parties in concealment of personal identity or true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of

illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens -- a statement why the participation is justified by the factors noted in paragraph F(1) below, and a statement of the federal prosecutor's approval pursuant to paragraph F(2) below;

(d) A statement concerning proposed expenses;

(e) A statement that the United States Attorney or Strike Force Chief is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed; and

(f) The date by which a response to the application is necessary, and a brief explanation of why a response is needed by that date.

(2) In the highly unusual event that there are compelling reasons for not advising either the United States Attorney or Strike Force Chief of the proposed undercover operation, the Assistant Attorney General in charge of the Criminal Division, or other Department of Justice attorney designated by him, may substitute for such person for purposes of any authorization or other function required by these guidelines. Where the Director or Chief Patrol Agent determines that such substitution is necessary, the application to the Central Office shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph C, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension, renewal, or modification of authority to engage in an undercover operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results and a statement that the United States Attorney or Strike Force Chief favors the extension, renewal, or modification of authority.

C. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of enforcement employees and such other appropriate employees of the INS as designated by the Commissioner and

consisting of attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by the Associate Commissioner for Enforcement as the Commissioner's designee.

(2) Upon receipt by the Central Office of a request for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the appropriate United States Attorney or Strike Force Chief as they deem appropriate. If the Committee concurs in the determinations contained in the application and finds that in other respects the undercover operation should go forward, see paragraph C(3) and (4), below, the Committee is authorized to recommend to the Commissioner or Associate Commissioner for Enforcement, see paragraph D, below, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the contemplated benefits of the undercover operation together with its operating and other costs. In assessing the costs of the proposed undercover operation, the Committee shall consider, where relevant, the following factors, among others:

(a) The risk of harm to private individuals or undercover employees;

(b) The risk of financial loss to private individuals and businesses and the risk of damage liability or other loss to the Government;

(c) The risk of harm to reputation;

(d) The risk of harm to privileged or confidential relationships;

(e) The risk of invasion of privacy;

(f) The degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph G, below; and

(g) The suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the undercover operation.

(4) The Committee shall examine the application to determine whether the undercover operation is planned so as to minimize the incidence of sensitive circumstances and to minimize the risks of harm and intrusion that are created by the circumstances. If the Committee recommends approval of an undercover

operation, the recommendation shall include a brief written statement explaining why the undercover operation merits approval.

(5) The Committee shall recommend approval of an undercover operation only if a majority of its members agree, provided that:

(a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive, or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, renewal, or modification of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Commissioner;

(b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Commissioner to approve the proposed undercover operation, there shall be no establishment, extension, renewal, or modification of the undercover operation until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the INS General Counsel's Office and the Office of Legal Counsel or other appropriate division or office in the Department of Justice about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

D. Approval by the Commissioner

The Commissioner or Associate Commissioner for Enforcement shall have the authority to approve operations recommended for approval by the Undercover Operations Review Committee. However, only the Commissioner may authorize a proposed operation if a reasonable expectation exists that:

(1) There may be a significant risk of violence or physical injury to individuals;

(2) A circumstance specified in paragraph IV(A)(14) or IV(A)(15) is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically

approved that aspect of the operation in accordance with applicable law.

E. Duration of Authorization

(1) An undercover operation may not continue longer than is necessary to achieve the objective of the authorization. In any event, such an operation shall not continue longer than six (6) months without new authorization to proceed.

(2) Any undercover operation initially approved by a District Director, Chief Patrol Agent, or Regional Commissioner must be reauthorized at the next higher level if it lasts longer than six (6) months.

F. Authorization of Participation In "Otherwise Illegal" Activity

Notwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in otherwise illegal activity.

(1) No official shall recommend or approve an undercover employee's or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:

(a) to obtain information or evidence necessary for paramount prosecutive purposes;

(b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or

(c) to prevent or avoid the danger of death or serious bodily injury.

(2) Participation in otherwise illegal activity which would be proscribed by federal, state, or local law as a felony or which would be otherwise a serious crime must be approved in advance by the Commissioner or the Associate Commissioner for Enforcement on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs A-D, above. The Commissioner's approval is required, however, for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approval by the Commissioner or the Associate Commissioner for Enforcement is not required for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private

individual is a major participant in the scheme to transport or conceal illegal aliens. Approvals shall be recorded in writing.

A recommendation to the Central Office for approval of participation in such otherwise illeqal activity must include the views of the United States Attorney or Strike Force Chief on why the participation is warranted.

(3) Participation in the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport illegal aliens must be approved in advance by the District Director or Chief Patrol Agent. Approvals by such officials shall be recorded in writing.

(4) The INS shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence (e.g., illegal wiretapping, illegal mail opening, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee or cooperating private individual should make every effort to consult with the District Director or Chief Patrol Agent. For otherwise illegal activity which would be a felony or which would be otherwise a serious crime, the District Director or Chief Patrol Agent can provide emergency authorization under paragraph IV(D), above. If consultation with the District Director or Chief Patrol Agent is impossible and there is not an immediate and grave threat to life or physical safety (destruction of property through arson or bombing is to be considered a grave threat to life or physical safety), an undercover employee or cooperating private individual may participate in the otherwise illegal activity so long as he or she does not take part in and makes every effort to prevent any act of violence. A report to the District Director or Chief Patrol Agent shall be made as soon as possible after the participation, and the District Director or Chief Patrol Agent shall submit a full report to the Central Office. The Central Office shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making false representations to third parties in concealment of personal identity or the true ownership of a proprietary

(e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the appropriate District Director or Chief Patrol Agent.

(8) Nothing in paragraph F(5) or (6), above, prohibits an undercover employee or cooperating private individual from taking reasonable measures of self-defense in an emergency to protect his or her own life or the life of others against wrongful force. Such measure shall be reported to the District Director, Chief Patrol Agent, United States Attorney, or Strike Force Chief as soon as possible.

(9) If a serious incident of violence should occur in the course of the criminal activity under investigation and an undercover employee or cooperating private individual participates in any fashion in such serious incident of violence, the District Director or Chief Patrol Agent shall immediately inform the Central Office. The Central Office shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

G. Authorization for the Creation of Opportunities for Criminal Activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in criminal activity in which he or she would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in criminal activity, the approving authority should be satisfied that:

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal criminal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the criminal activity in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged, or is engaging, in the criminal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Commissioner unless the Undercover Operations Review

Committee determines (see paragraph C, above), insofar as practicable, that either:

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in criminal activity of a similar type; or

(b) the opportunity for criminal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated criminal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in criminal activity, shall be based solely on law enforcement considerations.

H. Authorization of Investigative Interviews that Are Not Part of an Undercover Operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of the Central Office and without compliance with paragraphs IV (B) and (C) and V(A) and (B). These include so-called "pretext" interviews in which an INS employee uses an alias or cover identity to conceal his or her relationship with the INS.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph IV(A). Any investigative interview involving a sensitive circumstance -- even an interview that is not conducted as part of an undercover operation -- may only be approved pursuant to the procedures set forth in paragraphs V(A),(B),(C) and (D) (Applications referred to Central Office) or pursuant to the emergency authority prescribed in paragraph IV(D) if applicable.

VI. MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

A. Continuing Consultation with United States Attorney or Strike Force Chief

Throughout the course of any undercover operation, the District Director or Chief Patrol Agent or his or her designee shall consult periodically with the United States Attorney or Strike Force Chief or his or her designee concerning the plans, tactics, and anticipated problems of the operation.

B. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

(1) In any undercover operation, the District Director or Chief Patrol Agent shall, after consultation with the United States Attorney or Strike Force Chief, consult with the Central Office whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. The Central Office shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall be followed if an undercover operation is likely to involve one of the circumstances listed in paragraph IV(A) and either (a) the District Director's or Chief Patrol Agent's application for undercover operation approval did not contemplate the occurrence of that circumstance or (b) the undercover operation was approved by the District Director or Chief Patrol Agent under his own authority. In such cases the District Director or Chief Patrol Agent shall also submit a written application for continued authorization of the operation or an amendment of the existing application pursuant to paragraph IV(A), above.

(3) Whenever such a new authorization or amended authorization is required, the INS shall consult with the United States Attorney or Strike Force Chief and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

(4) After the institution of formal legal charges against a subject, concurrence by the United States Attorney or Strike Force Chief must be received before an undercover employee or a cooperating private individual can be allowed to attend a meeting between the subject and his or her lawyer.

C. Annual Report Of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Commissioner or Associate Commissioner for Enforcement. The INS shall also prepare a short summary of each undercover operation approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Commissioner, Attorney General, Deputy Attorney General, and Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of undercover operations approved and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

D. Preparation of Undercover Employees

(1) The District Director, Chief Patrol Agent, or a designated supervisory officer shall review with each undercover employee prior to the employee's participation in an investigation, the conduct that the undercover employee is expected to undertake and other conduct which is expected during the investigation. The District Director, Chief Patrol Agent, or designated supervisory officer shall expressly discuss with each undercover employee any of the circumstances specified in paragraph IV(A) which are reasonably expected to occur. Each undercover employee shall be instructed generally and in relation to the proposed undercover operation that he or she shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, use unlawful investigative techniques to obtain information or evidence, or engage in any conduct that would violate restrictions on investigative techniques or INS conduct contained in Department policy, and that, except in an emergency situation, he or she shall not participate in any otherwise illegal activity for which authorization has not been obtained under these guidelines. When the INS learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a case officer with each cooperating private individual.

E. Review Of Undercover Employee Conduct

(1) From time to time during the course of the investigation, as is practicable, the District Director, Chief Patrol Agent, or designated supervisory officer shall review the actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Commissioner, and consultation with the Commissioner shall be undertaken before the employee continues his or her participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A summary memorandum report shall be submitted at the conclusion of an undercover operation and shall include information concerning use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary for establishing, funding, and maintaining secure cover for an undercover operation. The report shall also contain information concerning any otherwise illegal activity engaged in by an undercover employee or cooperating private individual. It shall be submitted to the District Director, Chief Patrol Agent, or designated supervisory officer, and copies shall be submitted to the Regional and Central Offices.

(3) Additionally, a written report on participation in any otherwise illegal activity which would be proscribed by federal, state, or local law and which is not routine to the investigation shall be made by an undercover employee to the District Director, Chief Patrol Agent, or designated supervisory officer, with copies to the Regional and Central Offices, as soon as possible after the participation in the otherwise illegal activity. To the extent feasible, a similar report should be made on the conduct of each cooperating private individual.

F. Deposit Of Proceeds; Liquidation Of Proprietaries

Whenever a proprietary with a net value over $50,000 is to be liquidated, sold, or otherwise disposed of, the INS, as much in advance as the Commissioner or his or her designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition shall be deposited in the Treasury of the United States as receipts.

VII. RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, and they do not place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

WILLIAM FRENCH SMITH
Attorney General

Date: March 5, 1984

Effective March 19, 1984

Undercover Operations

The Department of Justice has requested permanent authority to conduct certain of its undercover operations. As you know, Congress has previously authorized these activities on an annual basis only. Does the current practice of annual reauthorization present any serious problems for the Department in the conduct of its undercover operations? In what ways other than through a permanent authorization might these problems be overcome? Do you believe that it would be appropriate for Congress to include legislative guidelines for the conduct of undercover activities as part of any permanent authority?

Annual reauthorization of undercover authorities does not by itself present serious problems in planning or conducting longterm undercover operations, because the Department plans such activities based on the assumption that appropriate legislation will be enacted which provides the authority to obtain and use exemptions. However, serious problems arise when lapses in this authority occur as a result of the expiration of an authorization act or an extension, and the FBI is forced to substantially curtail such operations. For example, during such a lapse the FBI is unable to use income generated by an operation to offset necessary and reasonable expenses of the operation or to deposit more than $100,000 in a bank account. The inability to utilize the exemptions in an authorization act to offset expenses precludes the ongoing undercover business from engaging in commercially-accepted practices, thereby greatly magnifying the risk of exposing the business cover, informants and/or undercover Agents. Likewise, the inability to deposit in excess of $100,000 in a bank account

damages the credibility of existing operations by severely diminishing the appearance of financial stability. In addition, and for the same reasons, during a lapse in authority the FBI does not consider undertaking many new operations that involve undercover businesses. Finally, each new authorization act requires that previously obtained exemptions must be re-certified.

There are two primary advantages to enacting permanent authorities in this area: (1) disruption of undercover activities caused by lapses in legislation and the associated risk of exposure would be eliminated; (2) considerable time and effort would be saved in re-certifying previously certified exemptions. Only permanent authorization can remedy the problems and risks created by annual reauthorization. Any other solution would necessarily involve the same problems and risks, although perhaps on a less frequent basis.

Finally, additional legislative guidelines for the conduct of undercover operations are unnecessary. With the exception of lapses in authority, the current procedure has worked well and permits the Executive branch to balance the competing interests involved in any undercover operation. Guidelines currently used in approving these activities provide protection to the targets of investigations, third parties and the government personnel involved, while at the same time preserving needed flexibility that would be absent from statutory guidelines. Thus, in the absence of a demonstrable need, there appears to be no reason to include legislative guidelines in any permanent undercover authority.

Peremptory Challenges

Q. On March 11, 1986, Assistant Attorney General John R. Bolton responded to my letter to you concerning the use of peremptory challenges by federal prosecutors. In his letter, Mr. Bolton acknowledged that there is nothing in the United States Attorneys' Manual that would forbid a federal prosecutor from exercising peremptory challenges on the basis of race in a particular case, and noted that, "it may be appropriate to consider amending the Manual to address the issue when the Supreme Court rules in the Batson v. Kentucky case . . . ."

As you know, on April 30, 1986, the Supreme Court decided the Batson case. It ruled 7 to 2 that prosecutors may not exclude blacks from juries on the basis of race. The Court explained that, "the core guarantee of equal protection ensuring citizens that their state will not discriminate on the basis of race would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions."

What action will the Justice Department take in order to ensure that all federal prosecutors adhere to the Batson v. Kentucky decision in their representation of the United States? How will the Justice Department incorporate the Court's ruling into the United States Attorneys' Manual?

A. The Executive Office for United States Attorneys intends to immediately bring the Supreme Court's recent decision in Batson v. Kentucky to the attention of United States Attorneys by publishing information on the case in an upcoming issue of the United States Attorneys' Bulletin.

In addition the United States Attorneys' Manual will be amended to insure that prosecutors are made aware of the Batson decision and that they adhere to this decision in their representation of the United States.

Use of Pretrial Detention

Q. Please assess the Justice Department's use of the Pretrial Detention Provisions of the Bail Reform Act of 1984. How do you respond to those who assert that the Department is overusing the law?

A. The specific language of the statute and the three levels of independent court review of Justice Department motions for pretrial detention assure that pretrial detention is not ordered in inappropriate cases, and Justice Department statistics indicate that the Department avoids filing such motions where they are not warranted.

Under the Act, pretrial detention on the ground of danger to the community is only available in limited categories of cases (see 18 U.S.C. 3142(f)). The Department's motion for pretrial detention is heard initially by a United States magistrate, and the defendant may appeal a detention order to the United States district court and thereafter to a United States court of appeals. Review of detention orders is thorough: review by the district court is de novo; the standard of review by the courts of appeals varies from de novo review to determination whether the district court decision was clearly erroneous.

Department of Justice statistics, with more than 90% of the United States Attorneys' offices reporting, indicate that since the beginning of the fiscal year, we have filed motions for pretrial detention in 1,220 cases and judges have held pretrial detention hearings on their own motion in 46 additional cases. Pretrial detention was ordered in 1,030 of these cases, but was based on dangerousness alone in only 159 cases. We have continued to be successful in about 80% of our motions, which indicates the law is being properly applied. Before enactment of the new Act, defendants could be

detained pretrial for risk of flight or obstruction of justice. Thus, only the 159 cases involve detention that might not have been previously permitted. Even that number is probably inflated: some of the findings of dangerousness were undoubtedly based on threats to witnesses, a permissible reason for pretrial detention under the common law, and other defendants detained for dangerousness might well have been detained in the past under a strained finding of risk of flight. According to a Justice Department study prior to passage of the Act, about 18% of federal defendants were detained on bail pretrial. Since there are approximately 40,000 or more defendants indicted in federal court each year, it is clear that a substantially lower percentage than 18% are being detained under the pre-trial detention provisions even allowing for under-reporting.

Those statistics available to us regarding appeal of pretrial detention orders demonstrate that about 85% of the government's appeals relating to a release decision have resulted in detention while only about one-fourth of the defendants' appeals are successful in obtaining release on appeal. The statistics also show very low numbers of appeals: 96 by the government in this fiscal year and 47 by defendants. Furthermore, in the courts of appeals there have been only one or two decisions adverse to the government that have held that pretrial detention was inappropriate; most of the still limited number of adverse appellate decisions have related to procedural errors or questions of interpretation that inevitably arise when a new statute is first implemented. There has been one major adverse decision: two judges of a panel of the Second Circuit have just agreed in two separate opinions (and with a dissent) that pretrial detention on the grounds of dangerousness is unconstitutional if it lasts for a lengthy period of

time. United States v. Melendez-Carrion, No. 85-1431 (2d Cir. May 2, 1986). Only one of the two judges is of the view that pretrial detention on the grounds of dangerousness is unconstitutional per se. The Department is filing a petition for rehearing en banc since that decision conflicts with decisions in other federal courts.

In summary, the limited number of cases in which defendants have been detained pretrial solely on grounds of dangerousness and the high rate at which the Department's requests for pretrial detention have survived independent judicial scrutiny belie any notion that we are overusing the statute.

CHAPTER I. BAIL REFORM ACT OF 1984

The statistics available to us demonstrate that the new law has worked remarkably well to provide for the detention of dangerous criminals. Some statistics are available which illustrate how the pre-trial detention provisions have been used. The Departments statistics for fiscal year 1985 are low, however, because they are based only on reports from the field, and often the results of detention hearings were not called in. Of the 1,463 hearings reported to us from October 12, 1984, through September 30, 1985, 1,204 persons were detained and only 259 requests were denied. Slightly less than half of these (534) were in drug cases. Of these, 1,204 defendants, 559 were detained because of the risk of flight alone, 208 were detained because of risk of harm to the community alone, and 437 were detained because of both risks.

Figures illustrating the use of the pre-trial detention law during the first two months of fiscal year 1986 have been compiled under a new reporting system. Although compliance with the new system has not been uniform, figures for fiscal year 1986 should be much more accurate. Thus, with the understanding that the figures are incomplete because several districts, including some of the larger districts have not yet reported, preliminary reports for October and November 1985 indicate that 448 detention hearings have been held. Detention has been granted in 346 instances and denied in 102.

Our reporting indicates that the application of the new pre-trial detention provisions has not been uniformly even. Magistrates in some areas of the country still appear to be reluctant to use the new law. The overall usage level, however, is appropriate.

Two cases show how the new pre-trial detention provisions can be particularly necessary and helpful:

The first case was related to us by an Assistant United States Attorney (AUSA) in Boise, Idaho. Just after the new law passed, his office indicted 23 people, all of whom except one are now in custody, who are associated with the Aryan Nation terrorist organization. This group was involved in bank robberies resulting in the loss of millions of dollars. It had stashes of automatic weapons and caches of explosives. It also had "safehouses" all over the country, and cars waiting in many locations in case a member had to make a quick get-away. Perhaps most frightening were the contract killers the group had hired to kill witnesses. The AUSA we spoke with had the terrifying experience of having learned, through a wiretap, that the group had been following his daughter. Needless to say, pre-trial detention was ordered in this case.

These people probably would not have been detained before, as they could have met any level of bond. And the vast reach of the group would have assured a safe haven for any who wanted to flee. One can well imagine the obvious relief the prosecuting attorney felt knowing these terrorists were in jail where they could not harm the community or his family.

Another case, this time from Cleveland, Ohio, illustrates how the new law provides a means to detain dangerous drug dealers. The defendant told a Federal Bureau of Investigation (FBI) undercover agent he could supply the agent with two to three kilos of cocaine per week from his cocaine lab. As the result of a deal between the defendant and the agent, a rendezvous occurred at which one and one-half kilos of cocaine changed hands. The defendant and others were arrested; a search warrant uncovered the lab. The magistrate set a high bail for the defendant, but at the arraignment the defendant moved to lower the amount. The judge treated the Government's motion for detention as an appeal of the magistrate's order.

Before the enactment of the new law, the defendant's motion would most probably have been granted, and the defendant would have gone free: he had no prior record, he was young, and he had a family. However, the Government availed itself of the presumption that one accused of a ten-year drug felony is dangerous to the community, and the defendant was detained. Later it became evident that the defendant had a large quantity of arms in his house and car and substantial connections in the Caribbean. But because of the new law he was denied access to either of these "assets."

Set forth below are profiles of cases in which defendants were detained on the risk of safety alone, according to reports we have received from the field, so presumably a large number, if not all, would have been released under the old law.

1. N.D. Ohio

   A defendant, charged with conspiracy to distribute 1 kilo of cocaine, threatened undercover agent and told the case agent his kids were dead.

2. M.D. Florida

   A defendant, charged with possession of destructive device, told undercover agent he would kill state's attorney for $5,000.

3. W.D. Pennsylvania

   A defendant, charged with conspiracy to burn federal building, had a prior conviction of assault with intent to kill.

4. M.D. North Carolina

Defendants committed two bank robberies with guns in four day period.

5. S.D. West Virginia

A defendant, charged with being a felon in possession of a firearm, had three prior convictions for crimes of violence and made an unsuccessful attempt to persuade a witness not to appear before the grand jury.

6. M.D. Florida

A defendant was found in possession of 32 hand grenades and numerous machine guns. He had threatened to kill an undercover officer and set off explosives in the courthouse.

7. N.D. Florida

The defendant bombed three abortion clinics. He had no criminal record.

8. S.D. Florida

A defendant was proved by circumstantial evidence to be driver of truck from which shots were fired at police during raid on cocaine lab. The Magistrate initially set bail but the district court ordered detention.

9. E.D. Virginia

Two defendants, a drug trafficker and his "enforcer," were charged as a result of a reverse undercover operation with attempted possession of, and with intent to distribute, cocaine with a potential two million dollar street value. The "enforcer" had a prior heroin distribution conviction.

10. N.D. Illinois

A defendant was charged with kidnapping, robbing, and raping two women while armed with a pistol. The victims were taken across state lines by defendant and two others. The district court noted that the conduct showed characteristics of "impulsive, random violence." The defendants had ". . . a propensity to commit whatever violent crime circumstances permitted. Persons who manifest such characteristics and act on them present a predictable danger to the safety of the community which no set of conditions on release can reasonably prevent."

11. N.D. Alabama

Defendant, a member of the Aryan Nation, conspired to harbor persons charged with committing a major robbery and another who assaulted a federal officer.

12. N.D. Mississippi

Defendant, brother of a defendant in a bank robbery prosecution, threatened witness in that case.

13. E.D. Kentucky

A defendant, charged with bank robbery, committed crime while on bail for similar state charge. He had a prior bank robbery conviction and is a drug addict.

14. E.D. Michigan

A defendant, charged with multiple drug distribution counts, committed crimes while on state parole and on bond for pending state assault charges. He had also threatened witnesses.

15. E.D. Louisiana

A defendant, charged with distribution of one once of cocaine to an undercover agent, was also charged with two attempted murder counts in state court for shooting at informants during investigation.

16. N.D. Florida

A patient with a long mental history was caught in unlawful possession of firearms.

17. Philadelphia Strike Force

A defendant, charged with CCE and other drug counts, possessed 52 gallons of P2P, precursor for PCP. He was also on parole for a federal gun violation. (Note: This was not considered a risk of flight case because the defendant never fled when he knew he was under investigation.)

18. M.D. Pennsylvania

A defendant, charged with distributing child pornography, had four prior convictions for sexual offenses involving violence including one committed while on parole.

19. M.D. North Carolina

A defendant, charged with bank robbery, had prior burglary and drug convictions.

20. E.D. Pennsylvania

A defendant, charged with possessing firearm, was arrested while on bail for selling drugs and for three firearm possession charges.

The new pre-trial detention provisions have been particularly useful in organized crime cases. Examples are set forth below.

One of the fastest applications of the bail provisions of the Act occurred when a Philadelphia Federal Judge applied it the day before its effective date to a newly-indicted attorney, Kevin Rankin, who had acted as the in-house counsel to a drug ring headed by George "Cowboy" Morlorano. The District of Massachusetts was even faster in ordering the detention of drug defendants Antonio J. Mazza and Anthony DeCologero two days prior to the Act's effective date. Bail was denied to all pending sentence and appeal as well.

Alleged Boston mob leaders Gennaro Angiulo and Ilario Zannino, indicted prior to passage of the Act, were jailed under the Act after it was passed. Trial in that case is now underway.

Delaware Valley labor leader Robert P. Delker was denied bond pending trial on RICO-labor racketeering charges. He was indicted in Philadelphia on October 31, 1984. Delker, who had terrorized construction contractors in the area with threats and violence, was ultimately sentenced to 35 years in prison.

Providence, Rhode Island, mob boss Gerard T. Ouimette, remanded for a new trial by the First Circuit, was placed in custody under the terms of the Act in October 1984. He was re-convicted on a firearms offense and sentenced to 18 years in custody as a dangerous special offender in July 1985.

Joseph John Sdono, who has been associated with several motorcycle gangs, was remanded to custody on October 19, 1984, in Cleveland, Ohio, following his arrest for loanshark collection. Michael L. Woods, to whom the debt was owed, was remanded sua sponte by the committing magistrate after a tape of Sdono's threats was played.

Joseph Basile and Anthony T. Pipito were jailed following their indictment on drug charges in Milwaukee, Wisconsin, on December 27, 1985. Six pounds of cocaine and $366,000 in cash had been found in searches preceding indictment.

Kensington and Alleghany (K&A) gang member John San Lorenzo was denied bail prior to trial and sentencing in a Philadelphia drug prosecution involving 52 gallons of P2P, a precourser used in the manufacture of amphetamine tablets. He was indicted January 23, 1985.

On February 16, 1985, acting Colombo family boss Carmine "Junior" Persico and family leader Dominick "Donnie Shacks" Montemorano were held without bail pending trial of an indictment alleging control of certain New York City labor unions by the LCN. Also held was family underboss Gennaro Langella (see below).

Pasquale Raucci, an associate of the Lucchese family which is alleged to control air freight at JFK Airport in New York, was detained under the Act of parole revocation on a 1977 conviction for counterfeiting and possession of molotov cocktails. He was indicted on February 20, 1985, in Brooklyn, New York.

In Albany, New York, 19 members and officers of the Hells Angels were held without bond for trial following their indictment on May 10, 1985, on charges of involvement with cocaine, hashish, and marijuana.

Herbert Blitzstein was jailed without bond following his indictment on August 7, 1985, for massive credit card fraud revealed by a FBI undercover operation in Las Vegas, Nevada.

Twenty-three defendants were held for trial without bond in New Orleans, Louisiana, following their indictment on September 5, 1985, for the failed attempt to import a "sample" shipment of over 25 tons of marijuana.

The following persons have been held without bond pending sentence and/or appeal in organized crime cases:

On October 30, 1984, seven convicted defendants, all members of the Rochester, New York, LCN hierarchy, were remanded to jail following jury verdicts of guilty in a RICO prosecution involving several mob murders and murder conspiracies.

Chicago "street tax" collector Peter Dounias was sentenced and jailed on November 14, 1984, following his extortion conviction. Also in Chicago, Joseph "Little Caesar" DiVarco and Ronald Ignoffo were remanded pending sentence following their gambling convictions on January 9, 1985.

On January 29, 1985, Gennaro Langella was held without bond following his conviction of perjury and obstruction of justice in Brooklyn, New York.

A grandson of a former New Orleans mob boss, Joseph Robert Provenzano, and six other convicts were held pending appeal after a jury verdict of guilty returned February 6, 1985, in a RICO/arson prosecution.

Salvatore Salamone, an arms supplier to defendants in New York's so-called "pizza connection" heroin case (and a defendant in that prosecution) was denied bail pending appeal following his firearms conviction is Scranton, Pennsylvania, on March 13, 1985.

New York organized crime figure John Gregory "Buster" Ardito and his co-defendant Vincent Pollina were denied bond after conviction on May 20, 1985, for a plot to obstruct justice by supplying drugs which would allow Connecticut extortion defendant Francis "Fat Franny" Curcio to feign a heart attack to avoid trial.

Bail pending appeal of fraud and bookmaking offenses by Nicholas A. Mauro was revoked on July 17, 1985, when he was indicted in Albany, New York, for loansharking.

In August 1985, bond on appeal was denied to Chicago defendant Richard Guzzion following imposition of a 15-year jail term for the attempted murder of Chicago mob leader Alfred Pilotto.

A New York defendant in the United Bamboo prosecution, George A. Lu, was detained without bail pending removal following his arrest in Las Vegas, Nevada.

These cases demonstrate the success we have had in applying the new law in the field.

We have also had a great deal of success in the courts with the legal aspects of the new law. Its constitutionality has been upheld at least twice and gone unchallenged in a plethora of other cases interpreting the Act. In only one case, United States v. Colombo, has a judge indicated that the pre-trial detention provisions could present constitutional problems.

The defendant, Anthony Colombo, leads a Brooklyn organized crime ring involved in drug dealing, robbery, and extortion. He was indicted together with 24 codefendants on various charges involving drugs, robberies, and violence. The magistrate ordered pre-trial detention based on Colombo's dangerousness, but later released him on bail because he could as easily orchestrate crimes from in jail as from out.

Judge Weinstein of the Southern District of New York, on appeal, rejected that reasoning, but nevertheless affirmed the magistrate's release order because he reasoned that the complicated nature of the case would mean the defendant would

be incarcerated for 13 months to two years before the trial could be completed and that such a lengthy detention was unconstitutional.

The Second Circuit granted the Government's request to stay Colombo's release. On November 19, 1985, the appeals court reversed Judge Weinstein's ruling. The court held that the conditions of release set by the district court did not adequately protect the community from Colombo. The panel also deemed "premature" Judge Weinstein's ruling that the prospect of an extended period of pre-trial detention under the new law infringed upon Colombo's due process rights.

The Second Circuit reviewed the Bail Reform Act's legislative history and found that Congress was not unmindful of the problem posed by a lengthy period of pre-trial detention when it enacted the new law. Nevertheless, in the court's view, Congress had explicity rejected anticipated length of detention as a factor to be considered in pre-trial detention decision, choosing instead to allow the issue to be governed by the Speedy Trial Act. The court envisioned the possibility of a future case, however, in which exclusions granted under the Speedy Trial Act might lead to lengthy incarceration prior to trial. In such a case, the court advised, the length of a defendant's pre-trial detention might not survive a due process challenge. Because the length of Colombo's period of pre-trial detention was purely a matter of speculation, the court chose to make no determination whether substantial length of delay of the trial counseled for Colombo's release as a statutory or constitutional issue.

As a result of the Second Circuit's Colombo decision, the Department achieved its immediate goal of preventing the release of a significant criminal prior to trial. The court's opinion did not satisfy the Department's long term concerns, however, because although the Second Circuit was the first court of appeals to confront the issue of lengthy pre-trial detention, the court postponed resolving it. The court's opinion leaves open the possibility of a future challenge to the constitutionality of the Act's pre-trial detention provisions in a case involving an extended period of detention prior to trial. Thus, we may be forced in some big cases to choose between detention and severance.

There have been other interesting issues in the appellate courts. One of the most problematic involves the "first appearance" requirement--the provision that the Government must move for a pre-trial detention hearing at the defendant's first appearance before a judicial officer. The defendant may seek a continuance for up to five days, the Government may seek a continuance for up to three days, and either side may seek a continuance for a longer period for "good cause." Some courts have strictly adhered to the "first appearance" requirement, preventing the Government from seeking detention unless a

hearing or continuance was sought at the initial appearance, or new evidence regarding the defendant's dangerousness is found. Other courts have been more flexible: one court held that the first appearance requirement was not violated where the hearing was postponed until the defendant had counsel. Another court held that the ten-day automatic temporary detention of defendants already on pre-trial release, parole, or probation, or subject to deportation tolls the first appearance requirement. The issue is far from settled and a legislative solution may ultimately be necessary.

Another interesting issue involves the effect of the presumptions on the Government's burden at the detention hearing. Specifically, do the statutory presumptions shift the burden of proof, or just the burden of production, to the defendant?

The Department of Justice maintains that the entire burden of proof switches to the defendant. Unfortunately, the Department's position has found only limited judicial support. One district court held that when a presumption is applicable, the defendant must prove he or she is not the type of offender, and/or the circumstances attendant to the charges are not those, that the legislative history contemplates presumptively to justify detention. But two Courts of Appeal have found the presumptions only shift the burden of production to the defendant--not the burden of persuasion. At least the courts take a realistic view of the defendant's burden--the presumption does not "burst" simply upon a defendant's production of slight evidence in his favor. Rather, the presumption carries throughout the hearing and is one factor the court must weigh in its detention decision.

Another appellate issue is what standard of review the appellate court should use to evaluate the detention decision. It is fairly well settled that the district court must conduct a de novo review of the magistrate's decision. But while almost all courts agree that appellate courts must give deference to the trial court's judgment, the Third Circuit holds that any appellate review is de novo following previous Third Circuit law. The legislative history of the new bail law does not suggest that the standard of review, at either the district or appellate court level, was intended to be altered by the new law. Thus, local precedents control in this area.

In other respects the case law has generally been favorable. The courts almost unanimously have agreed that the Act's provisions apply to offenses committed before October 12, 1984, as the provisions are procedural in nature. Prosecutors have been permitted to proceed by hearsay or proffer at the hearings. Most Circuits appear to have adopted closely the Department's view that before a defendant can be granted bail pending appeal he or she must not simply prove by a preponderance of evidence that he or she does not pose a risk

of flight or to safety, but that the appeal raises a genuinely close and significant question of law. This new standard, best explained by the Eighth Circuit in the Coulombe case, should result, if faithfully followed, in few convicted defendants being out on bail pending appeal. In the coming months we will be studying the practical effect of this new standard on the number and timing of post-conviction incarcerations.

In all, the new Bail Reform Act has met with remarkable success. We have been able to attain our goal of locking up many highly dangerous criminals prior to trial. Thus our communities are safer, and there is less chance that defendants will "skip out" before trial. Additionally, judges are able to make the detention decision honestly and properly because they are authorized to take into account the defendant's potential dangerousness to the community.

Justice Department Guidance on Pretrial Detention

Q. What guidelines do the Justice Department use to insure that the law is used only to detain people that are a serious risk to the community or are unlikely to make their court appearance? Is there any evidence that the pretrial detention legislation has been effective in reducing the number of non-appearances by persons released on bail?

A. In December 1984, the Department issued a Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress which includes a section on the Bail Reform Act of 1984. The handbook contained several requirements and suggestions to be followed by federal prosecutors in implementing the statute; many of these memorialized requirements that had earlier been imposed by telegram or memorandum to United States Attorneys' offices. The handbook stated that pretrial detention should be sought in appropriate cases, and that "[b]ecause of the sensitivity of the considerations that led to the balance achieved by these provisions, however, particular care should be taken to assure their responsible application." Prosecutors were required to obtain approval from their United States Attorney before filing any motion for pretrial detention and to consult with the Justice Department before filing such a motion in specified circumstances. Consultation with the Department was required before filing a detention motion on the ground of dangerousness "unless there is clear evidence of dangerousness such as prior instances of threats or violence toward victims or witnesses, or unless the charge involves the commission of a violent crime or drug offense while on pretrial release"; consultation was required before filing a detention motion on the ground of risk of flight "unless there is clear evidence of risk such as a previous instance of

bail jumping or escape, or, if the defendant is an alien, lack of ties to the community." As a matter of departmental policy, a pretrial detention motion was not to be based solely on application of a rebuttable presumption that a particular category of person should be detained as set forth in 18 U.S.C. 3142(e) or solely on the nature of the charge in the indictment; the Department's view was that there should also be concrete evidence of a risk of flight or danger. If the district court ruled against the government, the United States Attorney's office could only appeal the decision if it obtained the views of the Appellate Section of the Criminal Division and the approval of the Solicitor General. Such approval has been sparingly sought and sparingly given, generally in cases where in our view the court's interpretation of the new statute was incorrect and extremely rarely where the court was clearly incorrect in our opinion in determining that a defendant did not pose a risk of flight or danger.

United States Attorney's offices have also been required to report to the Department on the status and outcome of pretrial detention hearings and appeals. Although these reports were initially made to the section of the Criminal Division having responsibility for the substantive offense, these reports have been centralized since the beginning of this fiscal year and form the basis of the statistics in the previous answer.

In addition to the specific guidance provided by the Handbook and supplemental materials, designated attorneys in the Appellate Section, the Narcotic and Dangerous Drug Section, and the General Litigation and Legal Advice Section have been available for consultation by Assistant United States Attorneys on questions of interpretation of the statute as well as for practical advice. Although the need for this

service has diminished since the early stages of implementation as the prosecutors and judges gained experience with the Act, the service remains available as needed. Consultation with the Department on whether filing a pretrial detention motion is appropriate is no longer required since we believe, and the statistics on independent court review of our motions support our belief, that prosecutors do not often request detention where it is inappropriate to do so. We will continue to monitor the statistics at least until the end of the fiscal year to assure that this continues to be the case, and of course the requirement for Solicitor General approval of appeal of a district court decision is a permanent feature of our procedures. We are in the process of reviewing possible permanent guidelines for use of pretrial detention based on risk to safety for inclusion in the United States Attorneys Manual.

As to the second part of the question relating to whether there has been a reduction in nonappearance by persons released on bail, we have no statistics on this subject. We note, however, that pretrial detention for risk of flight was permissible before the new Act was passed and we do not anticipate that the Act will have any particular impact on the rate of nonappearance. In fact, since the Act specifically requires the holding of a pretrial detention hearing under specified procedures rather than the bail hearing that may have been more informal in the past, it is possible that the Act could result in a slightly lower rate of detention on grounds of risk of flight than had previously occurred. This is not to suggest that the Act will necessarily result in a higher level of nonappearance but only to suggest that more careful screening of defendants before pretrial detention is sought may lower the rate of detention.

Pretrial Detention

Q. Is pretrial detention developing into a major contributor to overcrowding in the federal detention centers?

A. Since the beginning of Fiscal 1985 when the Bail Reform Act took effect, the Bureau of Prisons population of unsentenced prisoners in Metropolitan Correctional Centers and Federal Detention Centers has increased from 2,469 to 2,859 -- an increase of 390 or 16%.

The U.S. Marshals Service has analyzed the extent to which increases in the population of all Federal court detainees is due to the Bail Reform Act. The Marshals estimate that most of that increase is a result of the Act.

Regional Circuit Court Nominations Switched to the District of Columbia Circuit

Q. In recent months, there have been two instances in which persons being considered for nomination to one of the regional circuit courts of appeals have ultimately been nominated to the U.S. Court of Appeals for the District of Columbia Circuit. In each case, the investigation by the ABA Standing Committee on the Federal Judiciary had already been completed by the time the decision was made to nominate the candidate to the D.C. Circuit. As a result, the bar and bench in the District of Columbia were never formally consulted with respect to these nominations, as they would have been had the nominee been slated for the D.C. Circuit to begin with. I understand that, in each case, the ABA Standing Committee would have been willing and able to supplement its initial investigation of each nominee by consulting with lawyers practicing before, and judges sitting upon, the D.C. Circuit Court. However, once the nomination to the D.C. Circuit had been made, the ABA Committee felt that this option was foreclosed.

While this scenario has not occurred often, it certainly could recur, since, unlike the eleven regional circuits, the judges of the D.C. Circuit are generally drawn from locations outside the circuit itself. If it does recur, will you advise the ABA Committee before formally submitting the nomination to the D.C. Circuit, and request that the Committee supplement its investigation by soliciting the views of the bar and bench of the District of Columbia, through appropriate channels? If not, how do you suggest that the lawyers and judges of the District of Columbia can best participate in the process of selecting the judges who sit on the federal bench in the Nation's Capital?

A. As you know, the investigation of prospective judicial nominees by the Standing Committee on the Judiciary of the American Bar Association is intended to advise on the qualifications of the prospective nominee rather than to indicate his or her popularity within the local bar where he or she will sit as a federal judge. Thus, the appointment to a different federal judgeship from that originally contemplated should not affect the validity of the evaluation and there should be no need for a second evaluation.

Moreover, it is surely not inappropriate that the background investigation on any candidate would have been centered in the place where the candidate is best known. In the case of

candidates who have been switched from a regional Court of Appeals to the Court of Appeals for the District of Columbia, that area will most often be the original region. While the District of Columbia representative could and would surely conduct a proper investigation of a candidate originally considered for the Court of Appeals here even when the candidate is from another region, there also can be no real objection, in the unusual circumstance of a transferred candidacy, to that investigation having been conducted by the member of the ABA Committee designated for the region originally contemplated since he or she would be familiar with the existence and reliability of possible sources or contacts who could provide relevant information on the candidate's character and competence. To the extent that a candidate's experience reflects contacts with members of the District of Columbia bar so that such persons could offer information or observations useful to the ABA's process, the regional representative conducting the investigation would, I am sure, be conscientious in contacting those persons.

Of course there is, as noted above, a member of the ABA Committee designated for the District of Columbia Circuit. That member participates fully in the evaluative process that is based on the report generated by the regional representative for all candidates, including those eventually nominated to the District of Columbia Circuit.

Role of the Office of Legal Counsel

Q. How many opinions have been produced and circulated to affected agencies in FY 1985 by OLC?

A. According to figures submitted to Congress in connection with the Department of Justice's budget, in fiscal year 1985 the Office of Legal Counsel prepared an estimated 462 opinions for offices or agencies in the executive branch outside of the Department of Justice, and an estimated 494 opinions for other components of the Department of Justice. In addition, the Office of Legal Counsel approved approximately 41 executive orders and presidential proclamations, and handled a substantial number of other assignments. These other assignments included bill comments (approximately 274) and responses to congressional inquiries (approximately 21), as well as oral requests for information or advice that did not necessitate or result in a written opinion, and requests for participation by the Office in intra-departmental and inter-agency activities.

Q. How many opinions were solicited by the affected agencies?

A. As a general policy, the Office of Legal Counsel gives legal advice only at the request of another component of the Department of Justice or of an executive branch agency or office. No record is kept of the total number of requests for advice received by the Office of Legal Counsel during any given year, but that number should be approximately equal to the number of responses made by the Office, which was outlined above.

Q. Of the opinions solicited in FY 1985, how many were solicited by the Office of Management and Budget and what matters of law or legal policy did they involve?

A. The Office of Legal Counsel formally responded to requests for legal advice from the Office of Management and Budget on three occasions during fiscal year 1985, as follows:

1. November 23, 1984, Memorandum to Michael J. Horowitz from Ralph W. Tarr re "Regulatory Authority of the Advisory Council on Historic Preservation";
2. January 23, 1985, Memorandum to Michael Horowitz from Ralph W. Tarr re "Alleged violation of the Antideficiency Act by the Federal Savings and Loan Investment Corporation";
3. January 25, 1985, Memorandum to Michael Horowitz and Edwin Gray (FHLBB) from Ralph W. Tarr re "Issuance of a Preferred Stock Dividend by the Federal Home Loan Mortgage Corporation"

Moreover, the Office of Management and Budget forwards proposed executive orders and certain presidential proclamations to the Office of Legal Counsel, which has the responsibility under 28 C.F.R. 0.25(b) of advising as to the form and legality of such orders and proclamations prior to their transmission to the President. As noted previously, in fiscal year 1985 the Office of Legal Counsel approved approximately 41 executive orders and presidential proclamations. In addition, requests for bill comments generally are sent to the Department of Justice by the Office of Management and Budget, and assigned among the various components by the Office of Legislative Affairs. Bill comments and responses to congressional requests prepared by the Office of Legal Counsel are forwarded to the Office of Management and Budget for clearance. The issues raised by draft executive orders and proclamations, bill

comments, and congressional requests obviously are broad, and can include anything from substantial issues of constitutional interpretation and application to very particular questions of statutory interpretation.

Finally, the Office of Management and Budget -- particularly the Office of General Counsel -- often consults the Office of Legal Counsel informally on legal issues that OMB identifies in the course of its several review responsibilities. OMB performs a very useful function in that regard, because it is often in the best position to identify possible legal issues and problems that need to be addressed by the Department of Justice. These more informal requests seldom lead to formal written opinions by the Office of Legal Counsel.

Q. To what extent are OLC opinions binding upon the actions of the heads and officers of independent agencies?

A. The authority of the Office of Legal Counsel to render legal advice is derived from the authority of the Attorney General. Since enactment of the Judiciary Act of 1789, the Attorney General has been charged with general responsibility for advising the President and the heads of executive and military departments on legal matters. That responsiblity is now codified in 28 U.S.C. 511-513, which provide that the Attorney General "shall give his advice and opinion on questions of law when required by the President," and the head of an executive department "may require the opinion of the Attorney General on questions of law arising in the administration of his department." Pursuant to 28 U.S.C. 510, the Attorney General has delegated to the Office of Legal Counsel many of his advisory functions, including preparing the formal opinions of the Attorney General, rendering informal opinions and legal advice to the various federal agencies, and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet. 28 C.F.R. 0.25. In recent years formal Attorney General opinions have been rendered only infrequently, and the bulk of the Attorney General's advice-giving responsibilities has been discharged by the Office of Legal Counsel.

Opinions of the Attorney General and opinions of the Office of Legal Counsel have always been regarded as determinative within the executive branch, and binding on executive branch departments and agencies, because of the Attorney General's role as chief legal adviser to the President. As a practical matter, agencies that are dependent on the Department of Justice for representation in litigation know that the Department's litigating divisions will rely on the prior advice of the Office of Legal Counsel in developing litigating positions.

Many of the "independent" agencies -- those whose heads do not serve at the pleasure of the President -- have independent litigating authority, and therefore may not face the same practical constraints in deciding whether to submit a question to the Office of Legal Counsel as do other agencies. In addition, Executive Order 12146 encourages, but does not require, those agencies to submit legal disputes to the Attorney General for resolution. Consequently, the Office of Legal Counsel provides advice directly to the "independent" agencies only on rare occasions.

Q. One recent controversial OLC opinion concerned executive privilege claims of former Presidents. In your view, to what extent does a President's claim to executive privilege survive his tenure as President?

A. The Supreme Court has made it very clear that a former President retains his right to assert executive privilege after expiration of his term. As discussed in the February 18, 1986, opinion of the Office of Legal Counsel on the Nixon Papers Regulations, the Supreme Court specifically considered this issue in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Court concluded that "the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic" and that it "survives the individual President's tenure." 433 U.S. at 448-449. A copy of the Office of Legal Counsel's opinion is provided with these answers for your information.

Q. What authority does an incumbent President have to review, modify or reject a former President's claim of executive privilege?

A. The privilege asserted by the incumbent President and that asserted by a former President are two separate, independent privileges. Neither the incumbent nor the former President can definitively determine whether the privilege has been validly asserted; that determination, according to United States v. Nixon, can be made definitively only by the courts.

In the February 18, 1986, Nixon Papers opinion, the Office of Legal Counsel addressed the question how the incumbent President should treat claims of executive privilege filed by a former President with the Archivist under the Presidential Recordings and Materials Preservation Act -- i.e., whether the incumbent President should make an independent determination of the validity of such claims. Because the Archivist is an executive officer, subject to the direction and control of the President, the incumbent President would have the authority to direct the Archivist to uphold or to reject administrative claims of executive privilege, subject to ultimate court review. As discussed in the Office of Legal Counsel's opinion, however, the reasons that led the Court in Nixon v. Administrator to conclude that former Presidents may assert executive privilege counsel that an incumbent President should not assess the merits of a former President's claim of executive privilege even if the incumbent either (a) would not have personally invoked the privilege under the circumstances; or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors.

This general deference to a former President's claim would have to yield if it conflicted with the discharge of the incumbent's constitutional responsibilities. If the

incumbent President believes that the discharge of his constitutional duties (such as investigation and prosecution of alleged crimes) demands the disclosure of documents claimed by the former President to be privileged, it may be necessary for him to oppose a former President's claim.

Q. Should a former President's claim of executive privilege diminish over time? If so, in what respects? Should it survive his death?

A. As the Supreme Court stated in Nixon v. Administrator of General Services, 433 U.S. 425, 451 (1977), "[t]he expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office." In recognition of this principle, former Presidents have often allowed eventual release of confidential material contained in their presidential papers. The determination as to how long is long enough is difficult to make in the abstract, however. It depends, among other things, on the sensitivity of the particular communications, the expectations of the parties that the communications would be maintained confidential, and the impact of any release on the ongoing operations of the executive branch.

In preparing its February 18, 1986 opinion on the Nixon Papers Regulations, the Office of Legal Counsel was not asked to consider whether a claim of executive privilege survives the President's death, and the Office expressed no opinion on that question.

Office of Leg. Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

FEB 18 1986

MEMORANDUM FOR ROBERT P. BEDELL
Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

RE: Nixon Papers Regulations

The National Archives and Records Administration (NARA) has recently proposed final rules to govern the preservation and protection of, and public access to, the presidential materials of the Nixon Administration. These rules would implement the Presidential Recordings and Materials Preservation Act of 1974, Pub. L. No. 93-526, 88 Stat. 1695, 44 U.S.C. 2111 note (PRMPA), which directed the Administrator of General Services to take custody of the presidential papers and tape recordings of former President Nixon and to supervise the processing, screening, and preparation of those materials for public access. NARA, which has succeeded to those functions under the National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, 98 Stat. 2280, published the proposed rules for public comment last spring, 50 Fed. Reg. 12575 (Mar. 29, 1985), and subsequently transmitted them to the Office of Management and Budget (OMB) for review under Executive Order No. 12291. The proposed rules are the latest in a series of proposals that have either been vetoed by Congress, withdrawn because of congressional opposition or litigation, or struck down by the courts.

You have asked that this Office review the proposed regulations to determine whether they meet the statutory mandate of PRMPA to "protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."[1] As we discuss below, we believe the proposed regulations are adequate to meet that standard, so long as they are interpreted and administered as set forth in this opinion.

---

[1] Section 104(a)(5).

I. BACKGROUND

A. Nixon-Sampson Agreement

When President Nixon resigned in 1974, a large quantity of documents, files, and other materials accumulated by him and his staff remained in the government's custody.[2] While government archivists were collecting these materials for shipment to California in accordance with the former President's instructions, President Ford asked Attorney General Saxbe for advice about their ownership. The Attorney General concluded that the materials were owned by President Nixon but recognized that the materials were "peculiarly affected by a public interest" that might justify the imposition of "certain limitations directly related to the character of the documents as records of government activity." 43 Op. A.G. No. 1 at 6 (Sep. 6, 1974).

After the issuance of this opinion, the Administrator of General Services, Arthur Sampson, executed a depository agreement with President Nixon, under which President Nixon retained title but agreed to donate a substantial portion of the materials to the United States at a future date for research and study. 10 Weekly Comp. of Pres. Docs. 1104 (Sept. 6, 1974). While President Nixon reviewed the materials, they were to be deposited with the General Services Administration (GSA) under the Federal Records Act, 44 U.S.C. 2111,[3] and transferred to California, where they would be stored in locked areas. Neither President Nixon nor GSA could gain access to the materials without mutual consent. In addition, the agreement provided that for three years President Nixon would not withdraw any original writing, although he could make and withdraw copies. After the initial period of three years (five years in the case of original tape recordings), during which the President and archivists working under his direction were to review the materials, President Nixon could withdraw any of the materials and would be entitled to designate any tape recording to be destroyed. Documents not withdrawn or destroyed would be donated to the United States, with appropriate restrictions on public access. All of the tape

---

[2] These materials included approximately 42 million pages of documents, of which President Nixon estimated that he personally prepared or reviewed 200,000. Also included were more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the White House, and in President Nixon's offices in the Executive Office Building and Camp David. Numerous dictabelt recordings of President Nixon's recollections of daily events were included as well.

[3] The Federal Records Act authorized the Administrator of General Services to accept for deposit "the papers and other historical materials of a President or former President of the United States." 44 U.S.C. 2111.

recordings were to be destroyed after ten years (i.e., after September 1, 1984) or upon President Nixon's death, whichever event occurred first.

B. Presidential Recordings and Materials Preservation Act of 1974

While lawsuits challenging the agreement were pending,[4] Congress passed and President Ford signed PRMPA. In passing the legislation, Congress stated that information included in President Nixon's papers was "needed to complete the prosecutions of Watergate-related crimes" and that there was "a legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance." H.R. Rep. No. 1507, 93d Cong., 2d Sess. 2 (1974); see also S. Rep. No. 1181, 93rd Cong., 2d Sess. 4 (1974). At the same time, Congress indicated that public access to the materials "is to be provided in a manner comparable to procedures that have been followed by Presidents in providing access to their materials." H.R. Rep. No. 1507 at 5.

Section 101 of PRMPA directs the Archivist to obtain and retain possession and control of all tape recordings and "Presidential historical materials" from the Nixon Administration.[5] Section 102(a) prohibits the destruction of the tapes or materials except as may be provided by law, and Section 102(b) makes them available in response to court subpoena or other legal process or for use in any judicial proceeding. This access was made "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke . . . ." Sections 102(c) and (d) provide that President Nixon (or his designee) and the Executive Branch shall have access to the materials, subject to regulations promulgated under Section 103, which requires the Archivist to issue regulations to govern custody of the materials in Washington, D.C., and to assure the protection of the materials from loss, destruction, or access by unauthorized persons.

Section 104(a) requires the Archivist to issue regulations providing for public access to the Nixon materials. Under Section 104(a) the Archivist, in framing the regulations, is

---

[4] Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), dismissed as moot (Sep. 21, 1977), rev'd on appeal, The Reporters' Committee for Freedom of the Press v. Sampson, 591 F.2d 944 (D.C. Cir. 1978).

[5] "Historical materials" are defined, by cross-reference to the Federal Records Act, 44 U.S.C. 2101, to include "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

64-730 0 - 87 - 8

required to "take into account" seven factors, including (Section 104(a)(5)) "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

As enacted, Section 104(a) required that the public access regulations and any subsequent changes be submitted to both Houses of Congress, and provided that the regulations or changes could be disapproved by a resolution of either House within 90 legislative days of submission. This disapproval procedure was struck down as an unconstitutional legislative veto device in Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), but was found to be severable from the underlying authority to promulgate regulations. In the National Archives and Records Administration Act of 1984, supra, Congress deleted the legislative veto provision and instead required the submission of proposed regulations to Congress 60 days in advance of their effective date. 98 Stat. 2291.

Section 105(a) vests the United States District Court for the District of Columbia with exclusive jurisdiction to hear any constitutional challenge to the Act, any challenge to the validity of any regulation, and any action involving a question of title, ownership, custody, possession, or control of the materials or any award of just compensation required by Section 105(c).[6] Section 105(b) is a severability provision, and Section 106 authorizes appropriations of sums necessary to carry out the provisions of the Act.

C. Nixon v. Administrator of General Services

The day after President Ford signed PRMPA, President Nixon filed suit against the Administrator of General Services (who was then responsible for implementation of the Act), seeking injunctive and declaratory relief. President Nixon alleged that PRMPA was unconstitutional on the grounds that it: (1) infringed the powers reserved to the Executive Branch; (2) invaded executive privilege; (3) infringed President Nixon's constitutional rights of privacy, free speech, and free association; (4) was an unconstitutional search and seizure; and (5) was an unconstitutional bill of attainder.

---

[6] The specific mention in Section 105 of actions to recover damages for deprivation of private property was a compromise by Congress to avoid the controversial ownership issue. See, e.g., H.R. Rep. No. 1507 at 7; S. Rep. No. 1181 at 4. Former President Nixon has filed suit seeking compensation for deprivation of his presidential materials. Nixon v. United States, C.A. No. 80-3277 (D.D.C.) Briefs have been filed on the United States' motion for summary judgment.

A three-judge district court rejected these constitutional claims. Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976). The court emphasized, however, that because no implementing regulations had yet become effective under the Act,[7] the only issue before the court was whether "the regulatory scheme enacted by Congress [was] unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)." 408 F. Supp. at 334-335. Judge McGowan opined for the court that "[w]hen regulations finally become effective, . . . they could . . . eliminate the basis for some of the allegations raised by Mr. Nixon that his rights will be infringed." Id. at 335.

The Supreme Court affirmed the three-judge court's decision in Nixon v. Administrator, 433 U.S. 425 (1977). Like the lower court, it considered only "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists." 433 U.S. at 439. Emphasizing that the implementing regulations would have to be sensitive to the claims raised by President Nixon, the Court concluded that the limited intrusion effected by custody and archival screening of the Nixon papers met constitutional requirements.

1. Separation of Powers

President Nixon argued first that regulation of the custody and disclosure of presidential materials constituted an impermissible legislative interference with matters inherently the business solely of the Executive. See 433 U.S. at 440. The Court tested this claim by focusing on the extent to which the Executive Branch was prevented "from accomplishing its constitutionally assigned functions." Id. at 443. The Court stated that "[o]nly where the potential for disruption is present" is it necessary to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Ibid., citing United States v. Nixon, 418 U.S. 683, 711-12 (1974).

Measured against this standard, the Court concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." 433 U.S. at 445. The Court considered it "highly relevant" that the Act provides for custody and screening of the

---

[7] At the time of the district court's decision, the first three sets of regulations proposed by the Administrator had been disapproved by Congress or withdrawn. See p. 10, infra.

materials by officials of the Executive Branch,[8] and that such employees could have access only "for lawful Government use, subject to [the Administrator's] regulations." Although the Act also provides for access to the materials for use in judicial proceedings, and for eventual public access, it expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege", and to return purely private materials. Thus, the Court found that "[t]he Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch." Id. at 444. Although the Court recognized "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents," it concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." Id. at 444-445.[9]

2. Executive Privilege

Second, President Nixon alleged that the screening and potential public disclosure of confidential communications between him and his advisers would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking.[10] See 433 U.S. at 450. The former

---

[8] "The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees." 433 U.S. at 441.

[9] The Court also noted (443 U.S. at 445) that there was "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and other specific purpose statutes.

[10] President Nixon's executive privilege argument was limited to what is generally considered the "deliberative process privilege" -- i.e., communications made in confidence as part of the government's decisionmaking process. See United States v. Nixon, 418 U.S. at 705. In both the district court and the Supreme Court, President Nixon acknowledged that the "state secrets privilege" -- "the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters" (433 U.S. at 440) -- may be asserted only by an incumbent President. Ibid.

President accordingly asserted that the Act offended the presumptive confidentiality of presidential communications recognized in United States v. Nixon, 418 U.S. 683 (1974). See 433 U.S. at 440.

In assessing this claim, the Court first considered whether a former president can assert executive privilege. While recognizing that the incumbent President both has a greater need for the privilege and a greater ability to assess the need to assert it in particular cases, the Court concluded that former presidents may assert executive privilege. 433 U.S. at 449. Nonetheless, the Court held (id. at 451) that the "mere screening of the materials by the archivists" represented only "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns" -- an intrusion that was consistent with historical practice and justified both by the perceived need to preserve the materials for legitimate historical and governmental purposes and by the substantial public interest in restoring public confidence and improving Congress's understanding of how the political processes had worked. Id. at 452-53. Because the Court's review was limited to the facial constitutionality of the Act, it did not need to consider whether eventual public access to the presidential materials would present more substantial executive privilege concerns. The Court did, however, suggest that provisions of PRMPA, especially the provision directing the Administrator to take into account "the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege," would provide protection against intrusion into confidential communications of the President and his advisers. See id. at 450-51. In addition, the Court cautioned that "[i]f the broadly written protections of the Act . . . prove[d] inadequate to safeguard [President Nixon's] rights or to prevent usurpation of executive powers, there [would] be time enough to consider that problem in a specific factual context." Id. at 455.

3. Personal Privacy

Third, President Nixon argued that the Act violated his right of personal privacy under the Fourth and Fifth Amendments, because it effected a seizure of all of his records and tape recordings, including materials that may be private and personal, and provided for screening and review of those materials by individuals not chosen or supervised by him. The district court considered this to be "[t]he most troublesome challenge," because the historical practice of most Presidents

had been to exclude or to prohibit review of private materials, such as those relating to personal, financial, or family relations.[11] The district court concluded that "the manner in which such materials have been treated by past Presidents, together with the legislative approval of such treatment, . . . gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his consent." 408 F. Supp. at 360-361 (citations omitted). Nonetheless, the court found (id. at 362) that archival screening under PRMPA met "the touchstone . . . of reasonableness."

On appeal, the Supreme Court agreed that the Act was "a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives." 433 U.S. at 456, quoting 408 F. Supp. at 367. Recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life" and that President Nixon had a legitimate expectation of privacy in materials concerning such matters, the Court concluded that President Nixon's privacy interests were outweighed by "the public interest in . . . archival screening." Id. at 457-458. The Court noted that the government would return purely private papers and recordings, that the privacy claim related to only "a very small fraction of the massive volume of official materials with which they [were] commingled," and that separation of purely private matters could be achieved only by screening of the materials. Id. at 458-462.

4. First Amendment

The Supreme Court treated separately a second privacy argument made by President Nixon: that the Act's archival screening process would violate his constitutionally protected rights of associational privacy and political speech, because the materials to be reviewed by the archivists included records about his partisan political activities. The Court acknowledged that involvement in partisan politics is closely protected by the First Amendment, and that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 433 U.S. at 467, quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976). Nonetheless, the Court concluded that "the important governmental interests promoted by the Act" outweighed the First Amendment interests, particularly since the archival screening was the least restrictive way of

---

[11] The district court characterized those materials as embracing, for example, "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." 408 F. Supp. at 359.

promoting the governmental interests, and any burden imposed by the screening was "speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted." Id. at 467-468.[12]

Four Justices wrote separate concurring opinions in Nixon v. Administrator. Of particular relevance here is Justice Powell's lengthy partial concurrence setting out his view of the separation of powers claim, and emphasizing the extraordinary, emergency nature of the legislation. Justice Powell noted (433 U.S. at 503) that "[t]he difficult constitutional questions lie ahead," because the Act "deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisers, the three branches of Government, and the American public, once custody was established" (id. at 495).[13]

---

[12] The Court also rejected President Nixon's contention that PRMPA constituted a bill of attainder proscribed by Article I, Section 9, of the Constitution. According to President Nixon, Congress intended the Act as a "legislative judgment of blameworthiness," which "singl[ed] out [the President], as opposed to all other Presidents or members of the Government, for disfavored treatment." 433 U.S. at 468, 470. Noting that the Bill of Attainder Clause does not invalidate every statute that burdens particular persons or groups, the Court concludded that Congress did not intend the legislation to "inflict punishment" within the historical meaning of bills of attainder. Id. at 473-484.

[13] Chief Justice Burger and Justice Rehnquist filed lengthy dissenting opinions. The Chief Justice disagreed with the majority on virtually every point. Justice Rehnquist wrote only on the separation of powers issue, concluding that the Act "will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents." 433 U.S. at 547. Justice Rehnquist specifically rejected the notion that any substantial intrusion upon the effective discharge of the duties of the President could be "balanced" against the interests assertedly fostered by the Act. Ibid. Finally, he expressed considerable concern that the majority opinion "countenance[d] the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions." Id. at 545.

D. Proposed Final Regulations

1. Report of the Nixon Materials Regulations Review Group

Pursuant to the mandate of PRMPA, GSA attempted to promulgate final regulations on five different occasions. The first two sets were disapproved by the Senate pursuant to the legislative veto in Section 104(b).[14] The third set was withdrawn by the Administrator of General Services at the request of the Department of Justice, in order to reconsider the regulations in light of the Supreme Court's decision in Nixon v. Administrator.[15] The fourth set became effective on December 16, 1977, but was later withdrawn by GSA as part of a settlement agreement reached with President Nixon, who had filed suit to challenge the validity of the regulations.[16] The fifth set became effective on March 7, 1980 (45 Fed.Reg. 14855 (Mar. 7, 1980)), but was successfully challenged in a lawsuit filed by 29 former staff or high-level officials of the Nixon Administration. See Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983).[17]

---

[14] See S. Res. 244, 121 Cong. Rec. 28362 (1975); S. Res. 428, 122 Cong. Rec. 10159 (1976).

[15] See S. Rep. No. 748, 94th Cong., 2d Sess. 3 (1976).

[16] The settlement agreement reached by the parties to that litigation called for certain revisions to the regulations, and disposed of all of President Nixon's challenges except those concerning creation of public listening centers for presidential tape recordings and archival screening of tapes and dictabelts containing President Nixon's personal diary. Those two remaining issues were resolved in favor of GSA in Nixon v. Solomon, C.A. No. 77-1395, aff'd on other grounds sub nom. Nixon v. Freeman, 670 F. 2d 346 (D.C. Cir), cert. denied, 459 U.S. 1035 (1982).

[17] The district court held, inter alia, that Section 104(b) and the regulations promulgated thereunder were invalid under the reasoning of INS v. Chadha, 462 U.S. 919 (1983). Allen v. Carmen, 578 F. Supp. at 968 (D.D.C. 1983). Defendants were enjoined from further implementing or taking any actions pursuant to the existing public access regulations until such time as newly promulgated regulations become effective. The court found, however, that the authority delegated to the Administrator under Section 104(a) to issue regulations was severable from the legislative veto provision in Section 104(b), and that such authority remained fully valid along with the remainder of the Act. Id. at 971. The government did not appeal the district court's decision. As noted above, Congress subsequently repealed the legislative veto device in Section 104(b) and substituted a report-and-wait provision.

Following the Allen v. Carmen decision, the Archivist established the Nixon Materials Review Group (Review Group) to study and make recommendations on possible changes in, or alternatives to, the invalidated regulations. The Review Group, which consisted of three federal employees experienced in the archival processing of presidential materials, was charged "with the broad responsibility of rigorously reviewing all of the . . . regulations to determine if changes [were] necessary for reasons of (a) archival efficiency and compliance with commonly accepted archival standards; (b) consistency with the practices of Presidential libraries; or (c) compliance with [PRMPA]." Report of the Nixon Materials Review Group (Mar. 20, 1984) at 1. The Review Group did not address the legal sufficiency of the regulations. On March 28, 1984, the Review Group issued a report recommending that the set of regulations challenged in Allen v. Carmen be issued unchanged.

2. Contents of Proposed Regulations

With one exception,[18] NARA adopted the recommendations of the Review Group. After receiving public comments, NARA submitted the proposed final regulations to OMB for review under Executive Order 12291.

NARA takes the position that the proposed set of regulations "provides for archival treatment of the Nixon materials that is comparable to the treatment of similar materials of other Presidents in the Presidential libraries," except insofar as PRMPA requires otherwise. 50 Fed. Reg. 12576 (Mar. 29, 1985). The regulations require the Archivist to obtain exclusive legal custody and control of all "Presidential historical materials of the Nixon Administration." Section

---

[18] In order to meet constitutional objections raised by the Department of Justice, NARA modified the regulations governing composition of the Presidential Materials Review Board (see n.28, infra). Under prior sets of regulations, the Board included an archivist or historian nominated by the Council of the Society of American Archivists, "who shall not otherwise be a Federal employee or official." The Department of Justice advised NARA that this regulation was unconstitutional, because vesting decisionmaking responsibility for screening presidential materials in the hands of someone outside the Executive Branch was inconsistent with the theory adopted by the Supreme Court in Nixon v. Administrator to sustain the constitutionality of the Act -- i.e., that the materials would be within the exclusive control of the Executive Branch. The newly proposed regulations avoid this pitfall by requiring appointment of a historian from a federal agency to this position.

1275.14.[19] The regulations govern both archival processing of the materials (including segregation of materials that either should be returned to the originator or should be restricted from public access)[20] and eventual public access to the materials.

a. Archival Processing and Segregation of Materials

Section 1275.46 of the proposed regulations requires the archivists to process the materials for the purpose of segregating -- removing from the original files -- certain types of materials.[21] First, the archivists must segregate "private or

---

[19] In fact, the Archivist has already gained possession of all such materials. "Presidential historical materials" include:

> all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties. Included in this definition are materials relating to the political activities of former President Nixon or members of his staff, but only when those activities directly relate to or have a direct effect upon the carrying out of constitutional or statutory powers or duties.

Section 1275.16(a).

[20] Materials deemed to be "private or personal materials" are returned to their originator; all other segregated materials remain in the control of the Archivist but are removed from the files available for public access.

[21] The required archival processing of the Nixon materials involves three phases. In the first phase, the archivists examine the materials to establish physical and documentary control over them and to take any necessary steps to preserve the materials. In the second phase, the archivists review the materials to develop finding aids, such as folder title lists, series descriptions, and subject logs. Finally, in the third phase the archivists actually segregate the materials prior to opening the files for public access. See Nixon v. Freeman, 670 F.2d at 353.

personal materials"[22] for the purpose of transferring them to their "proprietary or commemorative owner." Section 1275.42(a). Second, the archivists must segregate materials that neither relate to "abuses of governmental power,"(i.e., Watergate materials)[23] nor otherwise possess "general historical significance."[24] Section 1275.46(b). Finally, the archivists must segregate materials subject to certain enumerated restrictions. Sec. 1275.46(c).

Under Section 1275.50(a), the archivists must segregate Watergate materials if:

(1) the Archivist is in the process of reviewing or has determined the validity of a claim by any person of a legal or constitutional right or privilege;[25]

(2) the Archivist is in the process of reviewing or has determined the validity of a petition by any person of the need to protect an individual's right to a fair and impartial trial;

(3) the release of the materials would violate a federal statute;

---

[22] "Private or personal materials" are defined to include (Section 1275.16(b)):

> those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff.

[23] "Abuses of governmental power popularly identified under the generic term 'Watergate,'" is defined to include alleged acts within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecution Force, or as circumscribed by the Articles of Impeachment adopted by the House Judiciary Committee. Section 1275.16(c).

[24] "General historical significance" is defined to mean "having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory powers or duties of the President, which an archivist has determined is of a quality sufficient to warrant the retention by the United States of materials so designated." Section 1275.16(c).

[25] See p. 17, infra.

(4) the materials are authorized under criteria established by executive order to be kept classified, with questions about the proper classification to be resolved in accordance with the applicable executive order.[26] Section 1275.50(a). The Archivist must also restrict access to any portion of materials relating to abuses of governmental power if

> the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person: Provided, That if material related to an abuse of governmental power refers to, involves or incorporates such personal information, the Archivist will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

Section 1275.50(b).

The Archivist must also segregate non-Watergate materials if:

(1) release would disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(2) release would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person;[27] or

(3) release would disclose investigatory materials compiled for law enforcement purposes, and disclosure of such records would (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source; (e) disclose investigative techniques or procedures; or (f) endanger the life or physical safety of law enforcement personnel. Section 1275.52(b).

If the archivists are unable to determine whether segregation is required by any of these provisions, or if they

---

[26] The Archivist may waive this restriction, upon certain conditions, for individuals engaged in historical research. Section 1275.50(a)(4).

[27] This is the same standard used for restriction of Watergate materials, except that it does not include the further proviso that information "essential to an understanding of the abuses of governmental power" shall not be restricted.

conclude that the required determination "raises significant issues involving interpretation of these regulations or will have far-reaching precedential value," they are to submit the materials to a panel of senior archivists. Section 1275.46(d). This panel, in turn, may certify the determination to the Presidential Materials Review Board,[28] which may either make a final administrative determination or recommend an initial decision to the Senior Archival Panel. Section 1275.46(g), (h).[29]

b. Access to Nixon Materials

Once archival processing has been completed for an "integral file segment,"[30] the Archivist must open for public access all materials in that segment that have neither been segregated pursuant to Section 1275.46 nor are subject to outstanding claims or petitions seeking such restrictions. Sections 1275.42(a). At least 30 days prior to opening any records to public access, the Archivist must publish notice in the Federal Register identifying the materials to be opened. The notice must also include a reference to the right of any interested person to claim, under the provisions of Section 1275.44 (see infra), a legal or constitutional right or privilege that would prevent or limit public access to any of

---

[28] The Presidential Materials Review Board consists of the Archivist of the United States, the Assistant Archivist for the Office of the National Archives, the Assistant Archivist for the Office of the Presidential Libraries, the Director of the Legal Counsel Staff of NARA, and a historian of a federal agency selected by the Archivist. Section 1275.46(f).

[29] The regulations also provide for periodic review of the materials placed under restriction, so that the archivists may make available for public access "those materials which, with the passage of time or other circumstances, no longer require restriction," and for appeal by researchers (presumably after records have been opened to the public) for removal of specific restrictions. Sections 1275.54, 1275.56. The Archivist must comply with the notice requirements of Section 1275.42 before opening any previously restricted records. Ibid.

[30] The regulations prescribe that the Archivist will process and open the Nixon materials by "integral file segment," which refers to "an archival determination that a particular group of processed documents constitutes an intelligible and complete unit for purposes of historical research." Nixon v. Freeman, 670 F.2d at 352 n.11, quoting "Nixon Materials Archival Processing Manual." The Archivist must give priority, "insofar as practicable," to processing of Watergate materials. Section 1275.42(a).

the materials. Ibid. Copies of the notice must be sent to the following individuals:

(1) the incumbent President or his agent;

(2) President Nixon or his designated agent or heirs;

(3) any former staff member reasonably identifiable as the individual responsible for creating or maintaining the file segment proposed to be opened;

(4) any individual named in the material that the Archivist may not restrict in accordance with Section 1275.50(b) (i.e., material that is "private or personal" but that may not be restricted because it is essential to an understanding of an abuse of governmental power); and

(5) any individuals who are named in the materials and who have requested that the Archivist provide personal notice of the proposed opening of integral file segments when those segments contain references about them. Section 1275.42(b) & (c).

Objections to disclosure must be filed with the Archivist within 30 days after publication of the notice. An individual may file an objection claiming

(1) a legal or constitutional right or privilege which would prevent or limit public access to any of the materials (section 1275.44(a));

(2) that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial (Section 1275.44(b)); or

(3) that the materials are private or personal and that he or she is the proprietary or commemorative owner (Section 1275.44(d)).

An objection must be in writing and must identify the specific materials to which it relates. Section 1275.44(a). Unless the claim is that the materials are private and personal, the Archivist is responsible for making the final administrative decision regarding access. Ibid. In making that decision, he "may consult with other appropriate Federal agencies." Section 1275.44(c). If the claim alleges that the materials are private or personal, the Archivist must transmit the claim to the Presidential Materials Review Board, which is then responsible

for issuing a final administrative decision. Sections 1275.44(d), 1275.46(i).[31]

The Archivist may not permit public access to the contested materials while objections to their release are pending. If the Archivist's administrative determination is adverse to the claimant, the Archivist must refrain from opening the material to public access for at least 30 days after the claimant receives notification of the decision. Section 1275.44(a). The claimant may then seek judicial review in the United States District Court for the District of Columbia under Section 105(a) of the PRMPA.

Presidential materials that are not restricted (either by the Archivist or by court order) become available for public reference, in locations and under rules prescribed by the Archivist. Section 1275.62. In particular, the regulations provide (in accordance with the settlement agreement in Nixon v. Freeman) that researchers may listen to reference copies of certain tape recordings at the National Archives Building in Washington, D.C. and at other locations chosen by the Archivist. Section 1275.64(c). The regulations do not allow members of the public to reproduce the tapes. Section 1275.64(a)(3).

II. ANALYSIS

The Supreme Court in Nixon v. Administrator repeatedly emphasized the critical importance of the requirement in Section 104(a)(5) of the PRMPA that regulations promulgated by the Archivist protect "any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." In rejecting the separation of powers objections raised by President Nixon, the Court stessed (433 U.S. at 44):

> [A]lthough some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104(a)(5), and to return purely private materials to appellant, § 104(a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.

---

[31] Upon receiving such a claim, the Board must notify the claimant of its impending consideration and allow him to supplement his reasons for the claim. The Board must also publish notice of its consideration in the Federal Register and must then receive and take into account the views of any member of the public respecting the public or private nature of the materials. After considering all of the positions put forth, the Board must issue a written decision, including any concurring or dissenting opinions. Section 1275.46(i).

Similarly, in reviewing President Nixon's executive privilege claim, the Court emphasized that "any eventual public access will be governed by the guidelines of § 104, which direct the Administrator to take into account 'the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege,' § 104(a)(5), and the need to return purely private materials to the appellant, § 104(a)(7)." Id. at 450.

The regulations proposed by NARA would implement the statutory mandate in two ways: (1) the Archivist, after reviewing the materials, will restrict public access to or return certain types of materials;[32] and (2) the Archivist will provide notice of the opening of file segments and an opportunity to object to release of specific materials.[33] You have asked this Office to consider whether these provisions adequately protect the interests of parties who may be able to object to disclosure on constitutional or other legal grounds. The following discussion focuses primarily on whether the proposed regulations provide sufficient protection for documents covered by executive privilege. We also discuss whether the scheme set up by the proposed regulations to provide notice and an opportunity to object is legally sufficient in view of the volume of materials to be released.

A. Executive Privilege

United States v. Nixon recognized that there is a legitimate governmental interest in preserving the confidentiality of communications to and from the President and among those who advise him. The Court acknowledged that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 U.S. at 705. With the exception of classified or classifiable information,[34] however, the proposed regulations do not require the Archivist to segregate materials that would fall within the scope of executive privilege -- i.e., confidential predecisional communications between or among the President and

---

[32] See discussion at ps. 14-15, supra.

[33] See discussion at ps. 16-17, supra.

[34] The regulations do require the Archivist to segregate and withhold from public access any materials that "are authorized under criteria established by Executive order to be kept secret," and provide that any question about the proper classification of materials be resolved in accordance with the applicable executive order (i.e., Executive Order 12356). Section 1275.50(a). Thus, the proposed regulations provide substantial protection for materials that would fall within the "state secrets" arm of executive privilege.

his advisers.[35] Instead, protection for privileged materials is dependent upon the claims process. Any individual who believes he may be able to assert a legal or constitutional privilege against disclosure must review the materials and file a claim with the Archivist asserting that specific materials should not be released. The Archivist then makes an administrative decision, reviewable in the United States District Court for the District of Columbia, on whether to uphold the claim. See discussion at p. 17, supra.

On their face, the proposed regulations make no distinction between an incumbent President's claim of executive privilege and objections raised by other parties. The incumbent President, like the former President and certain other interested individuals, will receive notice as each integral file segment is opened, and he bears the burden of reviewing all of the materials and identifying those that should be restricted from public disclosure. Furthermore, by their terms the regulations would require the President, like any other person claiming a privilege, to file written objections to release of specific materials, and the Archivist would then make the final administrative determination whether those materials should be withheld. Without express qualification, the regulations state:

> Unless the claim states that particular materials are private or personal . . . , the Archivist will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials.

Section 1275.44(a) (emphasis added). The burden would then rest on the claimant to challenge in court any adverse decision by the Archivist. See p. 17, supra.

Needless to say, if this provision applied literally to claims of the incumbent President -- that is, if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the Archivist's decision in court -- it would be an unconstitutional infringement on the President's power. We believe, however, that this provision need not and should not be read to allow the Archivist to sit in judgment on an incumbent President's claim of executive privilege. On the contrary, we believe that the Archivist, as an officer of the Executive Branch, is legally bound to respect such claims.

---

[35] The report issued by the Review Group takes the position that most materials falling within the category of "confidential communications" would already be segregated under one of the enumerated categories (such as personal privacy or national security).

Article II, Section 1 of the Constitution vests "[t]he executive Power" in the President. Article II, Section 3 requires the President to "take Care that the Laws be faithfully executed . . . ." In order to perform these functions, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to execution of the law. From its earliest decisions, the Supreme Court has consistently recognized this basic principle. For example, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803), Chief Justice Marshall stated:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

This fundamental principle -- that the President must be able to supervise and control the actions of subordinate Executive Branch officers -- was reiterated in the Supreme Court's trilogy of cases involving the President's power to remove federal officials. In Myers v. United States, 272 U.S. 52 (1926), the Court invalidated a statute that limited the President's power to remove certain postmasters. In reaching this conclusion, the Court noted that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ." 272 U.S. at 163-64. The Myers Court echoed the reasoning of Marbury v. Madison. Noting that all Executive Branch officers are "under the general administrative control of the President by virtue of the general grant to him of the executive power," the Court emphasized that the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. at 135. With respect to the statutory responsibility of Executive Branch officers to promulgate regulations, the Court stated (ibid.): "The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President

should have the power to remove them." In Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958), the Court acknowledged limits to the President's removal power,[36] but explicitly reiterated and reinforced the link between the President's dual rights to control and to remove Executive Branch officials.[37] See also Buckley v. Valeo, 424 U.S. 1, 123 (1976). The critical need for presidential supervision of officers who perform executive functions underlies the recent holding by the United States District Court for the District of Columbia that the Comptroller General (who is removable by Congress) may not constitutionally exercise executive functions:

---

[36] In Synar v. United States, No. 85-3945 (Feb. 7, 1986), the United States District Court for the District of Columbia noted that the intellectual foundations of Humphrey's Executor have eroded:

> It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies . . . . Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies. Finally, the expansion of due process protections, statutorily prescribed procedures for both rulemaking and adjudications and an elaborate system of judicial review, have provided in more targeted fashion some of the protection against political intervention, when it is appropriate, which Humphrey's Executor sought to provide wholesale. It has in any event always been difficult to reconcile Humphrey's Executor's "headless fourth branch" with a constitutional text and tradition establishing three branches of government . . . .

Slip op. at 40-41 (citations omitted).

[37] As the Court noted in Humphrey's Executor, 295 U.S. at 629-630," [t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."

> We are confident . . . that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.

Synar v. United States, slip op. at 46, No. 85-3945 (Feb. 7, 1986).

The Archivist is appointed by the President, with the advice and consent of the Senate,[38] and is removable by the President. See 44 U.S.C. 2103. The Archivist is unquestionably a purely executive officer. He serves at the pleasure of the President and is therefore subject to the President's supervision and control. Indeed, as the Supreme Court made clear in Nixon v. Administrator (433 U.S. at 424), grave separation of powers questions would be raised if those responsible for implementing the provisions of PRMPA were not officers or employees of the Executive Branch, and thus under the supervision and control of the President: "The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch."

Moreover, the assertion of executive privilege is an exercise not of any statutory authority given to a subordinate officer of the Executive Branch, but of the inherent constitutional authority of the President.[39] The privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that vest in the President the "execu-

---

[38] "The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist. The Archivist may be removed from office by the President. The President shall communicate the reasons for any such removal to each House of Congress."

[39] PRMPA does not purport to give the Archivist any independent statutory authority to assert executive privilege, but rather only directs the Archivist to take into consideration the "need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [th5e Nixon materials]." Section 104(a)(5).

tive power" and the responsibility to execute the laws. The Supreme Court explicitly recognized this constitutional basis for executive privilege in United States v. Nixon (418 U.S. at 705-706):

> Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Although the responsibility to assert executive privilege may be exercised, on behalf of the President, by subordinate Executive Branch officers,[40] the privilege is the President's, and his judgment that the privilege should be asserted cannot be overridden by officers or employees of the Executive Branch.

The regulations proposed by NARA necessarily must be read against this backdrop. Although the proposed regulations provide that the Archivist will make the final administrative determinations on questions of executive privilege, those determinations must be made under the supervision and control of the incumbent President. Thus, while the Archivist is certainly free to offer advice as to whether particular documents, in his judgment, are or should be protected by executive privilege, the Archivist has no legal authority to make a determination

---

[40] See, e.g., United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (state secrets privilege may be asserted by the head of an executive department).

inconsistent with the President's assertion of executive privilege.[41]

We do not believe that our legal conclusion necessitates any revision to the proposed regulations. Indeed, it is quite unusual for administrative regulations to recite explicitly that any decision to be made under the regulations is subject to the direction and control of the President; the President's authority to supervise and control the actions of his subordinate officers is implicit in any regulations implementing statutory or constitutional authority. It would be equally extraordinary for the regulations proposed by NARA to recite explicitly that the Archivist is bound by the incumbent President's assertions of executive privilege. The ability of the incumbent President to assert the privilege, and the duty of the Archivist to execute the President's decisions, must be regarded as implicit in the Archivist's responsibility under the regulations.

A related question is whether the Archivist must honor claims of executive privilege raised by former President Nixon. Since the Archivist, as previously noted, is an Executive Branch official subject to the authority of the incumbent President, the question really is how the incumbent President

[41] As previously noted, a literal interpretation of the Archivist's authority under the proposed regulations would require the President to bring suit against the Archivist to keep particular documents from being disclosed. The Department of Justice has long taken the position that no case or controversy under Article III exists when the opposing parties are two executive agencies, both of whose heads serve at the pleasure of the President. See Letter from F. Henry Habicht, Assistant Attorney General, Land and Natural Resources Division to Rep. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations (Dec. 4, 1985). Because the President can resolve such a dispute as part of his responsibility to execute the laws, there is no concrete adversity between the parties. This Article III jurisdictional defect would apply *a fortiori* to lawsuits between the President and one of his subordinate officers. To be sure, in *Nixon v. United States* the Supreme Court entertained a suit between a sitting President and one of his current subordinate officers. In that case, however, the Court emphasized that the Special Prosecutor had been granted a unique degree of independence from the rest of the Executive Branch, and through regulation had been given explicit power to contest the invocation of executive privilege in the process of seeking evidence. 418 U.S. at 694-695. The Archivist, on the other hand, enjoys no such independence. Moreover, the Court in *Nixon* emphasized that because the matter arose in the course of a federal criminal prosecution, it was within the traditional scope of the Article III power. This consideration would obviously not apply to a civil suit seeking an injunction against disclosure of privileged materials.

should properly treat a claim of executive privilege asserted by a predecessor.

We start from the proposition, recognized in Nixon v. Administrator (433 U.S. at 448-449), that a former President may independently assert executive privilege. Noting that the effective discharge of the President's duties depends on his ability to receive candid advice and information from his subordinates, the Court reasoned (ibid.):

> The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.

The Court further observed (id. at 449 (emphasis added)) that "the fact that neither [former] President Ford nor [then incumbent] President Carter supported [former President Nixon's claim] detract[ed] from the weight of his contention." Implicit in this statement was the recognition that this lack of support went only to the weight of the claim and did not necessarily undermine it.

The Court's conclusion and reasoning in Nixon v. Administrator strongly indicate, in our view, that an incumbent President should respect a former President's claim of executive privilege even if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. To be sure, an incumbent President reviewing a former President's assertion of executive privilege would no doubt be strongly influenced by the reality that his own claim of privilege might someday depend on a future President's willingness to uphold it. Nonetheless, a former President has independent authority to claim executive privilege precisely because an incumbent may not be willing to safeguard the confidential communications of prior (and perhaps politically antagonistic) administrations. The incumbent and his staff may not be sufficiently sensitive to the need to preserve the confidentiality of documents relating to matters with which they were not involved and may be unfamiliar. Furthermore, an incumbent administration's decision to disclose particular documents created during a prior administration might be influenced by considerations of political advantage. Accordingly, we believe that, as a general matter, an incumbent

President should respect a former President's claim of executive privilege without judging the validity of the claim. Any judgment regarding such a claim should be left to the judiciary in litigation between the former President and parties seeking disclosure. Only if such disputes are resolved by the judiciary will the integrity of the priivilege be preserved and the potential for an appearance of impropriety be avoided.

While we conclude that it is generally not appropriate for an incumbent President to review and adjudicate the merits of a predecessor's claim of executive privilege, this principle must yield when it conflicts with the discharge of the incumbent's constitutional responsibilities. Accordingly, if the incumbent President believes that the discharge of his constitutional duties (e.g., investigation and prosecution of alleged crimes) demands the disclosure of documents claimed by the former President to be privileged, it may be necessary for him to oppose a former President's claim. This situation, however, should not be confused with situations involving only a generalized public interest in disclosure.

In sum, we believe that it follows from the conclusion and reasoning in Nixon v. Administrator that an incumbent President should respect a claim of executive privilege asserted by a former President unless the incumbent concludes that respecting such a claim would impair his ability to discharge his constitutional responsibilities. And just as we believe, for the reasons previously explained, that the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion.

B. Adequacy of Notice

Your request also necessitates an inquiry regarding whether the regulations provide a sufficient opportunity for parties (including the incumbent President) to review materials as they are opened and to object to their release. Two aspects of the regulations are critical in this regard: (1) the 30-day period for filing claims and (2) the extent of notice to be provided to interested parties.

1. Thirty-day Period for Filing Claims

The proposed regulations provide that the Archivist will publish notice in the Federal Register "[a]t least 30 calendar days prior to the opening to public access of any integral file segment of the materials." Section 1275.42(b). The purpose of the 30-day period is to allow persons to review the documents and file with the Archivist any constitutional or other legal objections to their release. Objections must be in writing, must state the claimed right or privilege, and must identify the "specific materials to which [the objection] relates." Section 1275.44(a).

We would have grave reservations about the statutory sufficiency of the notice period if the 30 days provided in the regulations posed an absolute time bar to any party's opportunity to raise constitutional or legal objections to release of specific materials. Given the volume and sensitivity of documents likely to be released in any integral file segment,[42] 30 days might well not be long enough to conduct a comprehensive review of the documents, to identify the "specific materials" that may be subject to a right or privilege barring release, and to file claims covering those materials. NARA, however, has made clear that the 30-day period is a minimum, not a maximum, and will be extended for good cause.[43] Moreover, NARA has stated its intention to allow the two parties with the heaviest review burden -- the incumbent President and former President Nixon -- access to the documents in advance of the opening of any integral file segment in order to conduct a preliminary review. In practice, then, we understand that sufficient time will be provided to ensure that all parties have adequate opportunity to review the materials and to file their claims.

The regulations could, of course, be revised to reflect NARA's stated position that the 30-day period will be extended if necessary to ensure an adequate opportunity for reviewing the documents and filing objections. We do not believe, however, that the absence of such a specific provision is fatal to the legality of the regulations. The Archivist's responsibility under PRMPA to "protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [the Nixon materials]" must be construed to include the responsibility to provide reasonable time for affected parties to assert such rights or privileges. The regulations do not alter the Archivist's statutory responsibility to provide reasonable time; they merely set a minimum, which is not on its face arbitrary. Assuming the Archivist implements his responsibility evennandedly and

---

[42] For example, in 1983 GSA published notice, pursuant to the fifth set of regulations, that it would open the Nixon "Special Files" for public access. The Special Files, which were a single filing unit initiated by President Nixon in 1972 for documents prepared by high-level staff or administration officials that were perceived as particularly sensitive, consist of 628 cubic feet of textual materials. They include files from 37 staff members, the White House Administrative Files and Subject Category Files, the President's Office Files, and the President's Personal Files. 48 Fed. Reg. 36655 (Aug. 12, 1983).

[43] In fact, GSA twice extended the deadline for filing objections to disclosure of the Special Files in order to enable interested individuals to complete their review and file objections.

reasonably, by granting extensions upon a showing that a party has not had a reasonable time to review the documents and file claims, we believe the regulations are legally sufficient. We note that even absent any specific provision in the regulations governing the Archivist's responsibility to extend the time period, a refusal by the Archivist to grant additional time could be challenged as an abuse of discretion, if the claimant could demonstrate that the existing period was inadequate to protect his legal and constitutional interests.[44] Therefore, we believe that the rights of interested parties would be protected against any abuse of authority by the Archivist.

2. Extent of notice

Prior to the opening of each file segment, individual written notice will be given to (1) the incumbent President, (2) President Nixon, (3) staff members who created or who were responsible for maintaining a file, (4) individuals named in materials that are private or personal but are essential to an understanding of an abuse of governmental power, and (5) any persons who are named in the materials to be opened and who have requested that their names be placed on a registry maintained by NARA.[45] Section 1275. 42(c). "Universal" notice -- i.e., personal, written notice to every individual who is named or discussed in the Nixon materials -- will not be provided. The question we address here is whether, in order to meet the mandate of Section 104(a)(5), the Archivist must provide universal notice.

NARA has refused in the past to provide for universal notice. According to NARA, universal notice is not standard archival practice for other presidential libraries or other federal records archives. Moreover, the administrative burden and additional time entailed would be substantial. NARA has estimated that with present staff levels it would take 17 years just to identify every person in the Special Files, locate addresses, and prepare notification letters, and more than 300 years to notify every person mentioned in the 40 million pages of the entire Nixon materials. See Report of the Nixon Materials Review Group at 9; draft preamble to proposed regulations at 11.

---

[44] Consistent with our view that the Archivist is subject to the direction and control of the incumbent President, we believe the Archivist would have to honor any presidential request for additional time in which to review the documents and to claim privilege. And for the reasons previously stated, we believe that the same must be true with respect to requests made by the former President.

[45] Notice will also be published in the Federal Register. Section 1275.42(b).

We recognize that any system short of universal notice may deprive some individuals of the opportunity to assert a privilege or other legal right against nondisclosure. For example, an individual may have a right under the regulations to block disclosure of certain portions of the materials on the ground that their release "would constitute a clearly unwarranted invasion of personal privacy . . . or libel." Section 1275.50(b). Unless the individual suspects, however, that the materials contain such references and therefore places his or her name on the registry, the individual will not receive notice, and the right to nondisclosure will be lost. Thus, only universal notice would fully protect every "party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [the] recordings and materials." Section 104(a)(5).

Nevertheless, because universal notice would be unduly burdensome and costly, and would result in substantial delay in opening the Nixon papers to the public, we think that the system adopted in the regulations satisfies the statute by adequately "tak[ing] into account" the desirability of providing the fullest notice practicable. Although the regulations do not guarantee universal notice, they adopt the next best alternative. Under the regulations, an individual interested in receiving notice may place his or her name on a registry simply by writing to the Archives. When the Archives subsequently proposes to open a segment of the records, it will not just send out a form notice to everyone on the registry. Rather, the regulations clearly state that individuals listed on the registry will receive "personal notice . . . when [the] segments [to be opened] contain references about them." Section 1275.42(c). NARA has made clear that archivists will assist individuals in finding the particular references that triggered the notice.

While the possibility exists under the regulations that some individuals may lose the opportunity to assert valid claims against disclosure due to the lack of universal notice, we believe that protection of the presumably small number of claims falling into this category is outweighed by the prohibitive cost, burden, and delay of universal notice. Needless to say, the defense of this notice scheme would be substantially fortified if the Archives were to undertake, on a voluntary basis and within the constraints imposed by its limited resources, to provide notice to locatable individuals who are mentioned in the materials but are not listed in the registry. We strongly recommend this procedure.

III. CONCLUSION

In sum, we conclude that the regulations proposed by NARA, when interpreted and administered as set forth in this opinion, are adequate to fulfill the statutory mandate of Section 104(a)(5) to protect the opportunity of all parties to assert legal and constitutional objections to disclosure. We caution that our review is limited to the facial legality of the regulations, rather than their legality as applied in particular cases.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

Question from Senator Thurmond

The Committee has conducted several hearings to examine the need for reform in civil actions under the Racketeer Influenced and Corrupt Organizations Act (RICO). Assistant Attorney General Stephen Trott testified on behalf of the Department. He recognized that reform in this area is needed but did not offer clear guidance as to the scope of the reform. Has the Department further developed its position regarding such reform, and if so, can you explain that position?

We have attached for your information a copy of a July 22, 1986 letter to the Senate from the Justice Department which contains our proposed legislation reforming civil RICO legislation. Our proposed bill would amend the RICO statute to require proof of a prior criminal conviction as an essential element of a private civil RICO suit for treble damages.

IDENTICAL SUBMISSION TO THE SPEAKER

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 1986

The Honorable George Bush
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed for your consideration and appropriate reference is a bill to amend section 1964(c) of title 18, United States Code - the provision in the Racketeer Influenced and Corrupt Organizations ("RICO") Act that permits federal treble damage suits for injuries caused by RICO violations. The proposed bill would amend the statute to require proof of a prior criminal conviction as an essential element of a private civil RICO suit for treble damages. This restriction would not apply to civil RICO suits brought by the United States when it has just been injured by RICO violations. The Department of Justice believes that this approach would best respond to the increasingly troublesome issues that civil RICO litigation has raised over the past several years.

The need for civil RICO reform is clear. Recent Congressional hearings, court decisions, and studies by the Department of Justice and others have made it plain that private civil RICO enforcement is severely flawed in two fundamental respects. First, private RICO suits have not achieved their intended purpose as supplements to the federal government's criminal enforcement efforts against organized crime. Second, private uses of the statute have created clear and substantial dangers to other important federal interests.

When it enacted section 1964(c) as part of the Organized Crime Control Act of 1970, Congress hoped that private civil suits would assist in preventing infiltration of legitimate business by organized crime. That hope has not been realized. Fewer than ten percent of private civil RICO actions have been based on what is ordinarily considered to be organized crime activity. Instead, the vast majority of actions has arisen out

of commonplace commercial transactions allegedly involving fraud on the part of businesses and individuals that have no connection to organized crime. Other unanticipated applications of the statute have occurred in cases involving claims of sexual harassment, disputes over the leadership of a synagogue, and routine divorce controversies. Civil RICO has been used to attack an undercover FBI investigation of corruption in the Cleveland municipal court system.

The unexpected evolution of section 1964(c) into "something quite different from the original conception of its enactors," see Sedima, S.P.R.L. v. Imrex Co., Inc., 105 S. Ct. 3275, 3287 (1985), has lead to the unnecessary and unwise federalization of an area of the law that is best reserved to the states, and has had other significant detrimental consequences as well.

We do not believe that, when it enacted RICO, Congress thought it necessary to create a general federal remedy for fraud, or that it intended to do so. More to the point, there is today no valid reason to permit civil RICO's continued use in this manner, and every good reason for declining to do so.

To begin with, there is no need for a general federal fraud remedy. Persons who engage in serious fraud can be, and frequently are, prosecuted for criminal offenses under both federal and state statutes. In addition, federal laws and judicial decisions afford civil redress for specific types of fraudulent conduct, such as securities fraud, and state statutes and common law principles permit civil recovery for those species of fraud not covered by federal law. We know of no shortcomings in these various provisions such as would warrant adoption of a broad federal remedy for fraud.

Moreover, private civil RICO litigation has had a number of serious repercussions. First, the increasing use of section 1964(c) as a federal fraud remedy threatens to undermine carefully crafted and well established federal statutory schemes that have been developed to regulate the securities, commodities, banking, accounting, and savings and loan industries. In the securities area, for example, a plaintiff alleging fraud will always have an incentive to seek treble damages under civil RICO rather than, or in addition to, pursuing a claim for compensatory damages under the Securities Act of 1933 or the Securities Exchange Act of 1934, or under state law.

Second, the availability of section 1964(c) as a general federal fraud remedy undercuts standing limitations and procedural requirements that have been developed over fifty years to restrict access to federal courts. The Securities Act of 1933 and the Securities Exchange Act of 1934 provide express and implied causes of action for violations of each Act. These statutes, however, strictly limit standing to sue by imposing a

purchaser/seller requirement; they also impose stringent requirements of proof regarding "causation," "materiality," and "reliance." Private civil RICO plaintiffs who allege securities fraud can now completely circumvent these federal securities law limitations. Because approximately 40 percent of private civil RICO actions involve claims of securities fraud, and because civil RICO permits the evasion or undermining of carefully crafted statutory schemes in other areas as well, civil RICO has the potential to undermine legal doctrines that have evolved over decades to adjudicate claims in each of these areas.

Equally serious is the threat of civil RICO liability to legitimate businesses engaged in purely commercial transactions. Section 1964(c) permits virtually any legitimate business enterprise to be charged with "racketeering" and threatened with a judgment for treble damages and attorneys' fees, simply on the basis of an ordinary commercial dispute. Civil RICO skews dispute resolution in commercial cases, extorts settlements and increases legal fees, which costs ultimately will be passed on to the purchasers of the goods or services.

Finally, absent any need for a pervasive federal fraud remedy, it is inconsistent with the nation's constitutional principles to exert federal jurisdiction over forms of conduct that traditionally and appropriately have been regarded solely as matters of state concern. The observance of sound principles of federalism is not merely a theoretical imperative. The approach of leaving to the states all matters regarding which there is not a persuasive and constitutionally justifiable reason for federal involvement is dictated by practical considerations as well. Chief among these is the inappropriate and increasingly heavy burden that private civil RICO suits impose on the federal courts. It is no exaggeration to say that there has been an explosion of private civil RICO lawsuits over the past several years, nor does it seem unreasonable to predict a continuation of this trend as the statute's unusually attractive civil remedy becomes more widely understood and as efforts are made to apply it to an ever expanding range of conduct. Indeed, the recent emergence of a "Civil RICO Bar," replete with specialized reporting services, seminars, and practical courses of instruction, virtually ensures this result.

The unintended and undesirable evolution of section 1964(c) into a general federal fraud remedy requires an unequivocal Congressional response which accommodates important federal interests. These interests include maintaining the federal government's successful use of RICO's criminal provisions against large-scale organized criminal activities and enhancing the government's ability to make effective use of RICO's civil provisions. Other federal interests that should be taken into account include observance of sound principles of federalism,

eliminating burdensome litigation, and assuring the fair operation of our federal courts.

Several legislative approaches to civil RICO reform have been suggested. A common element of each proposal is that each would retain civil RICO's private enforcement mechanism, while limiting the circumstances to which it could apply. Over the past year, we have carefully considered each of these proposals in light of the federal interests discussed above. We have concluded that a requirement for a "prior criminal conviction" as a prerequisite to private civil RICO suits, is the preferable approach. If this approach is adopted, the vast majority of abusive and vexatious civil RICO litigation would be eliminated and ordinary state law fraud cases would remain in state court where they belong.

By contrast, changes in the definition of "pattern of racketeering activity" could also make it more difficult to obtain criminal convictions, while doing little to relieve federal courts of the burden of having to interpret and apply a general federal fraud remedy. A "fraud plus" requirement might not interfere directly with criminal prosecutions under RICO, but could limit the government's ability to use civil RICO effectively and would not be responsive to federalism concerns.

The fundamental problem with section 1964(c), lies in its underlying premise -- that civil suits by private litigants -- in the absence of a prior criminal conviction -- can reasonably be expected to discourage organized crime's efforts to infiltrate legitimate businesses. Experience and logic show this principle to be untenable. Private civil RICO enforcement has not succeeded in providing an effective weapon against organized crime. Indeed, one of the most significant aspects of civil RICO has been its virtual neglect by those for whose benefit the private remedy was provided -- the victims of organized crime. No doubt many potential plaintiffs have foregone private suits out of fear of physical retaliation, a consequence for which not even the prospect of treble damages and attorneys' fees could compensate. Moreover, even the most courageous victim might conclude that he could never collect a judgment for damages, either because potential individual defendants had no assets or because potential corporate defendants had been assessed heavy fines or had forfeited their assets to the government in the wake of a successful criminal prosecution. Our proposed amendment would remedy these problems by ensuring that private civil RICO actions are brought only against convicted criminals, the group that Congress intended to reach.

The Supreme Court, in the Sedima case, explicitly recognized this basic flaw in civil RICO, and just as plainly invited Congress to correct it:

64-730 O - 87 - 9

> It is true that private civil actions under this statute are being brought almost solely against [respected and legitimate enterprises], rather than against the archetypical, intimidating mobster. Yet this defect --if defect it is -- is inherent in the statute as written, and its correction must lie with Congress. It is not for the Judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications. (105 S. Ct. at 3287) [footnote omitted].

Given private civil RICO's failure as a useful weapon against organized crime, we believe that private enforcement should be modified to require a prior conviction before further damage is done to important federal interests. Such a course will not impair the legitimate interests of plaintiffs who can now use civil RICO in lieu of remedies provided by state law and other federal statutes. Those other state and federal remedies will continue to be available. Moreover, if individual states believe that an additional remedy, comparable to that now provided by section 1964(c), is needed to protect their interests or those of their citizens, they are free to take appropriate legislative action.

Concurrently with amendment of private civil RICO suits, we recommend that the statute be amended to clarify the federal government's ability to obtain monetary redress for organized criminal activity that causes injury to the United States. In the belief that such authority already exists, we filed such a suit last year in the Middle District of Florida. The court in that case has sustained our view, but because the question is not entirely free from doubt we think it would be wise to amend the statute so that it explicitly allows the United States to file damage suits for injuries suffered by it as a result of civil RICO violations.

The government already has authority to sue for injunctive relief on behalf of others and, presumably, on its own behalf as well. Thus, it would be anomalous to deny it the right to sue for damages when the United States has been injured by a RICO violation. Such suits could provide a particularly valuable method of protecting the public treasury from fraudulent misuse of federal funds. Damage suits by the United States would make possible the recovery of federal funds -- provided either through government programs or government contracts -- that have been fraudulently obtained or misused, as well as the recovery of other losses suffered by the government. For example, in the Florida case just referred to, the government is attempting to recover more than $47 million from two businessmen and three companies previously convicted of criminal RICO fraud against the

government in connection with the awarding of Department of Defense contracts.

The option to sue under such a provision would provide other benefits as well. For example, the possibility of recovering treble damages under RICO might make litigation worthwhile in situations in which the recovery of compensatory damages might not be cost effective but where important governmental interests should nevertheless be vindicated. Second, the possibility of a treble damage suit by the government could have a significant deterrent effect on persons contemplating fraudulent acquisition or misuse of government funds. With all of the recent revelations of possible fraud in the area of government contracts, such added deterrence would certainly be welcome. In this connection, it is important to remember that the federal interest in an effective effort against organized, systematic illegality -- whether manifested by fraud against the government or other conduct detrimental to the United States -- is, in essence, an interest in a result. We believe that the government should have effective tools to achieve that result in appropriate cases.

Adoption of this proposal could provide significant benefits to the government, and substantially enhance the deterrent impact of civil RICO. At the same time, because the Department currently screens and controls these cases as carefully as it oversees the uses of RICO's criminal provisions, and would continue to do so in the future, there would be no basis for criticisms such as are now being generated by irresponsible uses of the civil RICO statute by private plaintiffs.

The attached bill would amend 18 U.S.C. § 1964(c) as discussed above by requiring a prior criminal conviction for racketeering activity under section 1962 before a private party (which under the statute includes state and local governments) would be permitted to maintain a civil action. Suits by the United States are exempted from this restriction and expressly authorized by a new subsection (d). Finally the private cause of action is also limited by a new, two year statute of limitations, running from the date of the latest criminal conviction.

This is a most significant proposal which would respond in a sensible and effective manner to increasingly serious problems that have arisen in the interpretation and application of an important federal statute directed at the menace of organized crime. I would request that it be given careful and speedy consideration.

As explained above, the Department of Justice believes that, by helping to alleviate burdensome and vexatious litigation, enactment of this bill would have a salutary effect on the workload of the federal courts.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this legislative proposal to the Congress.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

BILL

This Act may be cited as the "Civil RICO Reform Act of 1986."

Sec. 2. Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c) Any person, other than the United States, who is injured directly or indirectly by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and, upon proof of such injury by a preponderance of the evidence, shall recover threefold the damages sustained and the cost of the suit, including a reasonable attorney's fee; provided, however, that no suit may be brought under this subsection against any person who has not been convicted of the violation of section 1962 alleged in the complaint or of two acts of racketeering activity included in the pattern of racketeering activity alleged in the complaint; and provided further that no damages may be recovered for pain and suffering.".

Sec. 3. Subsection (d) of section 1964 of title 18, United States Code, is redesignated subsection (e) and is amended

by striking "brought by the United States." and adding in lieu thereof:

"under this section.".

Sec. 4. Section 1964 of title 18, United States Code, is amended by adding a new subsection (d) as follows:

"(d) Whenever the United States is injured, directly or indirectly, by reason of a violation of section 1962 of this chapter, the Attorney General may sue therefor in any appropriate United States district court and, upon proof of such injury by a preponderance of the evidence, shall recover threefold the damages sustained by the United States and the cost of the suit, including a reasonable attorney's fee.".

Sec. 5. Section 1964 of title 18, United States Code is amended by adding a new subsection (f) as follows:

"(f) An action under subsection (c) may not be commenced later than two years after the date of the latest criminal conviction of the defendant alleged in the complaint.".

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

14 OCT 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Please find attached responses to questions posed by Senator Biden to the Attorney General following the Attorney General's testimony concerning the Department of Justice Authorization bill.

I regret the delay in responding to these questions. You may note that we are still awaiting a final response to the first question. However, I wanted to ensure that you receive the enclosed responses without further delay. The remaining response will be sent shortly.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

cc. Honorable Joseph R. Biden, Jr.
(with enclosure)

Attorney General's Role As Chairman of the Drug Enforcement Policy Board *

Q.#2. After a year as Chairman, do you believe an Executive Order may now be helpful in delineating authority and responsibility for the Chairman and Board members?

A. As I indicated during last year's hearing, I do not believe that an Executive Order is necessary to delineate either my role as Chairman of the Policy Board or the roles of the Board members. The National Narcotics Act clearly delineates my duty "to act as primary advisor to the President and Congress on national and international illegal drug law enforcement programs and policies developed by the Board." It further details my authority, among other things, to --

(1) direct, with the concurrence of the head of the agency employing such personnel, the assignment of Government personnel within the United States Government in order to implement United States policy with respect to illegal drug law enforcement;

(2) provide guidance in the implementation and maintenance of policy, strategy, and resources developed under subsection (a) of this section; [and]

(3) review and approve the reprogramming of funds relating to budgetary priorities . . .

In addition, the Act specifies that the White House Drug Abuse Policy Office "insure coordination between the National Drug Enforcement Policy Board and the health issues associated with drug abuse." In order to facilitate this coordination, the Director of the Drug Abuse Policy Office, Dr. Carlton Turner, has been made a member of the Board.

*A response to Question #1 of this series of questions will be forthcoming.

The Board meets monthly to consider a variety of drug issues and has not encountered any problems concerning ambiguity of the Board's or the Chairman's authority and responsibility.

Attorney General's Role As Chairman of the Drug Enforcement Policy Board

Q.#3. Did the Board develop and agree to a Federal Narcotics Control Budget for fiscal year 1987? Did the Board agree that cuts to Customs and IRS in this year's budget are appropriate in the overall context of our Federal Narcotics Program? Do we have a long range strategy with estimates for budget allocations that will be needed to meet certain goals?

A. While the Board did not develop a fiscal year 1987 budget for Federal drug control, it did participate in the budget process. Three times during the last year, the Board reviewed the budgets of various drug law enforcement agencies. In addition, the Policy Board staff is working with OMB and each agency with drug law enforcement responsibilities to revise their drug budget figures. This process is designed to ensure that budget figures more accurately represent actual expenditures, including funding for personnel, on drug law enforcement.

Concerning the "cuts" to the Customs and IRS budgets, neither budget was cut. The current Customs budget is the same level of funding that was included in the President's budget. The IRS budget has remained at approximately the same level as last year and there has been no reduction in drug law enforcement activity.

The Policy Board is in the process of developing a national and international drug law enforcement strategy, as mandated by the National Narcotics Act. Although this strategy will not prescribe estimates for budget allocations, it will establish priorities in different areas of drug law enforcement. This clearly is a crucial first step in determining specific funding requirements. The Policy Board, with the completion of its first strategy, plans to become more involved in the budget process.

ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES

Q.#1. "Who currently has overall responsibility for the 13 Organized Crime Drug Task Forces?"

A. The Organized Crime Drug Enforcement Task Force (OCDETF) Program was designed to be a highly decentralized program that could respond quickly and effectively to regional problems. The Guidelines provide for national oversight of the Program through a number of groups composed of representatives of various Federal departments and agencies.

The senior oversight group is the National Drug Enforcement Policy Board chaired by the Attorney General. The Board has responsibility for national policy formation and interagency cooperation and coordination; it deals only with exceptional, national-scale issues and is therefore rarely concerned with day-to-day details of the Task Force operations.

The OCDETF Working Group, chaired by the Deputy Attorney General, provides direct supervision and guidance to the Program nationally. It is composed of the heads of the participating agencies and is responsible for the articulation of policy and the coordination and maintenance of the Task Force Program. It is also responsible for resolving interagency administrative or policy disagreements which cannot be settled in the field.

The Washington Agency Representatives Group provides routine staff assistance to the Working Group and works in close association with the OCDETF Administrative Staff that has day-to-day responsibility for providing administrative support to the Task Forces and is responsible for records management and maintenance. This staff serves as a first echelon point of contact for the Task Forces when Washington intervention or problem solving is required.

Q.#2. "Has the Drug Enforcement Policy Board developed a long range plan for the continuation of the task force?"

A. As noted above, the National Drug Policy Board is responsible for national drug law enforcement strategy. During the last eighteen months, the Working Group has been in the process of refining and modifying Task Force policies and operational procedures to insure that continued vitality and responsiveness of the Program. The National Drug Enforcement Policy Board continues to be highly supportive of the Program as noted throughout its Federal Drug Enforcement Progress Report 1984 - 1985.

Q.#3. "Has the Drug Enforcement Policy Board considered what resources will be necessary to effectively carry out Task Force operations over the next year, two years, five years?"

A. The determination of the need for resource allocations is handled by the individual agencies themselves and the OCDETF Working Group. This is an ongoing process and involves the National Drug Enforcement Policy Board only at the macro level.

Q.#4. "What is the Drug Enforcement Policy Board's position concerning budget cuts to IRS and Custom agencies which the Treasury Department indicates will mean reducing their participation in the Task Forces? Aren't these agents vital to the major drug enforcement cases the Task Forces are supposed to be concentrating on?

A. As indicated in the response to question #3 on my role as Chairman of the Policy Board, the Customs and IRS budgets were not cut. Customs and IRS agents will continue to play a vital role in Task Force cases.

Tort Reform and Corporate Accountability

Q.#1. One of the most important and sensitive issues to come before this Committee is the question of tort reform and the liability insurance crisis. The report of the Administration's Tort Policy Working Group, which reported to you, indicates that the task force was established last fall. Could you tell us how this group came to be put together and who the members of the working group are?

A.#1. As I indicated at the hearing, the Tort Policy Working Group was established as a regular working group of the Domestic Policy Council, which is one of those Cabinet Councils established by the President. Attached is the memorandum establishing the Working Group, as well as a separate memorandum setting forth the charter of the Working Group.

As the attached charter indicates, the Working Group consists of those federal agencies with the strongest policy and/or programmatic interests in various tort law issues. Also attached is a list of the members of the Tort Policy Working Group.

Office of the Attorney General
Washington, B. C. 20530

23 October 1985

MEMORANDUM FOR THE SECRETARY OF COMMERCE

FROM: EDWIN MEESE III Edwin Meese III

SUBJECT: TORT POLICY WORKING GROUP

There have been a number of developments in recent years, including substantial legislative activity, in areas relating to tort law. Such areas include the establishment of administrative compensation systems or federal causes-of-action for persons exposed to toxic substances or radiation, product liability reform, compensation for vaccine-related injuries, professional liability of physicians, indemnification and standards of liability of government contractors, personal liability of government employees, amendments to the Federal Tort Claims Act, statutory limitations on tort liability for particular industries or activities, tort liability of State and local governmental bodies and officials under federal law, and the availability of adequate levels of tort liability insurance in the private sector. Because many of these areas may require consideration by the Domestic Policy Council, I am establishing a Working Group to monitor and analyze these and other developing areas relating to tort law, to identify relevant issues and options, and to make appropriate policy recommendations to the Domestic Policy Council.

Most of these recent developments in areas relating to tort law involve more than a single agency, and often involve legislative and regulatory activities as well as on-going litigation. Accordingly, I also am asking the Working Group to coordinate to the extent practicable agency policies and different types of agency activities, so as to ensure consistency between such policies and activities.

In addition, the Tort Policy Working Group will provide necessary continuity for the activities of previous Cabinet Council Working Groups reviewing certain areas relating to tort law, such as the Cabinet Council on Legal Policy Working Group on Toxic Torts and Compensation and the Cabinet Council on Human Resources Working Group on Vaccine Supply and Liability.

The Assistant Attorney General for the Civil Division will chair the Tort Policy Working Group. Doug Rigge has been recommended and I understand that you have approved him to serve as the representative from the Department of Commerce. The first meeting of the Tort Policy Working Group is scheduled for Monday, November 4 at 2 p.m. in Room 3605 Main Justice Building. Thank you for your cooperation.

Office of the Attorney General
Washington, D. C. 20530

23 October 1985

MEMORANDUM TO THE DOMESTIC POLICY COUNCIL

FROM: EDWIN MEESE III

SUBJECT: CHARTER OF THE TORT POLICY WORKING GROUP

Pursuant to the attached memorandum of October 23, 1985, I have established a Tort Policy Working Group which will report to the Domestic Policy Council. The Working Group will be chaired by the Assistant Attorney General for the Civil Division.

The charter of the Tort Policy Working Group is to:

- monitor and analyze all areas relating to tort law that have significant policy implications for the Federal Government,
- identify relevant issues and options as to such areas,
- make appropriate policy recommendations to the Domestic Policy Council concerning such areas,
- coordinate to the extent practicable agency policies and different types of agency activities (including legislative, regulatory and litigation activities) relating to matters within the Working Group's jurisdiction, and
- ensure consistency between such agency policies and activities.

Among the areas the Tort Policy Working Group will deal with are:

- the establishment of administrative compensation systems or federal causes-of-action for persons exposed to toxic substances or radiation,
- product liability reform,

- [illegible] asbestos related injuries,
- professional liability of physicians,
- indemnification and standards of liability of government contractors,
- personal liability of government employees,
- amendments to the Federal Tort Claims Act,
- statutory limitations on tort liability for particular industries or activities,
- tort liability of State and local governmental bodies and officials under federal law, and
- the availability of adequate levels of tort liability insurance in the private sector

The Working Group will identify other areas relating to tort law that are appropriate for its consideration.

The member agencies on the Working Group are the:

- Department of Justice,
- Department of Defense,
- Department of Commerce,
- Department of Labor,
- Department of Health and Human Services,
- Department of Energy,
- Environmental Protection Agency,
- Veterans Affairs Administration,
- Office of Management and Budget, and
- the Consumer Product Safety Commission.

The Working Group will request the participation of non-member agencies with regard to matters of concern to or involving agencies not represented on the Working Group.

The member agencies of the Tort Policy Working Group will provide the Working Group with the necessary staff, resources and other appropriate support to enable the Working Group to accomplish its tasks. The full cooperation of all the member agencies will be essential to the success of the Working Group.

TORT POLICY WORKING GROUP

Richard K. Willard
Assistant Attorney General
Department of Justice
(Chairman)

Douglas A. Riggs
General Counsel
Department of Commerce

Terrence Scanlon
Chairman
Consumer Product Safety Commission

H. Lawrence Garrett III
General Counsel
Department of Defense

J. Michael Farrell
General Counsel
Department of Energy

Francis S. Blake
General Counsel
Environmental Protection Agency

Ronald E. Robertson
General Counsel
Department of Health and Human Services

George Salem
Solicitor
Department of Labor

John H. Carley
General Counsel
Office of Management & Budget

William Roper
Administrator
Health Care Financing Administration

Donald L. Ivers
General Counsel
Veterans Administration

Robert L. Willmore
Deputy Assistant Attorney General
Department of Justice
Executive Secretary

Q.#2. What particular expertise do each of these individuals have which would qualify them to serve on a task force on tort policy? Are any of these individuals trial lawyers? Are any of them defense lawyers? Do any of them have any particular knowledge about the insurance industry? Why were there no representatives from the Federal Trade Commission, the one agency which has had some expertise in insurance matters?

A.#2. As the attached membership list indicates, the serving members of the Working Group and their representatives on the various task forces have a wide range of expertise -- all of which was relevant to the goals of the Working Group. In addition to expertise of the members of the Working Group, each member was asked to call upon the necessary staff, resources and other expertise available to them from within their respective agencies, as well as from outside non-member agencies. With the exception of Dr. Bill Roper and Chairman Terry Scanlon, all members of the Working Group are experienced attorneys, several of whom had active private practice litigation experience before entering the government. It should be noted in particular that many of the agencies represented on the Working Group have extensive tort litigation experience, and that many of the members of the Working Group -- as the General Counsels of their respective agencies -- supervise their agency's tort litigation activities.

Although the Federal Trade Commission was not included in the Working Group, both the Department of Justice and the Department of Commerce have expertise in the area of insurance. For example, the Antitrust Division of the Department of Justice authored much of the 1977 report of the Department to the Task Force on Antitrust Immunities, entitled <u>The Pricing and Marketing</u>

of Insurance. The Department of Commerce has considerable expertise on the economics of the insurance industry. Resources from the Commerce Department's Office of Economic Affairs (O.E.A.) and the Department's International Trade Administration (I.T.A.) were used in developing information on the insurance industry and the unavailability and unaffordability of liability insurance for U.S. businesses and service industries. These Offices have a history of closely following developments in the insurance industry. The individual sectors of I.T.A. closely monitor all aspects of the particular industries in their sector and use their knowledge of and contacts with the industries to gain an understanding and data on the availability/affordability crisis in their particular industries.

Q.#3. How did you go about conducting this study and how did you arrive at the conclusions set forth in the report of the working group? Did you get input from the American Trial Lawyers Association? Did you consult with any other outside groups or individuals?

A.#3 The study was conducted by the Task Force on Insurance Availability. Once the Task Force had completed an initial draft, it was circulated among all the agencies represented on the Tort Policy Working Group for their review and comment.

A number of groups were contacted for the purpose of obtaining specific data, when it was available, on the extent of the insurance availability and affordability crisis. This data was summarized in Chapter 1 of the report ("The Crisis in Insurance Availability and Affordability"). With the exception of the data reported in Chapter 1, most of the other information used in drafting the report was obtained from existing documents, virtually all of which are readily available to the public. These documents are cited in the footnotes accompanying the text of the report. While there were no consultations with groups outside of the government with regard to the actual substance of the report (other than, as noted, the compilation of the data summarized in Chapter 1), the Task Force and the Working Group reviewed various statements (including congressional testimony, press releases, and other documents) by a wide variety of interest groups regarding both the insurance crisis and tort reform. For example, the drafters and reviewers of the report were quite aware of the arguments and data published by interest groups such as the American Trial Lawyers Association and the National Insurance Consumer Organization as well as by a number of State entities (as is readily evident from the report itself), insurers and various affected groups, including small businesses, municipalities and professionals.

Q.#4. What individuals or groups in the trial lawyers community did you consult with? Did you contact trial lawyers groups at the state level? Did you contact the National Association of Attorneys General or the National Governors Association? Don't you believe their input might have been important?

A.#4. As noted in the previous answer, no groups outside of the government were consulted with regard to the actual substance of the report, other than to obtain the data for Chapter 1 of the report. But as also noted, the drafters and reviewers of the report were well aware of the arguments and data advanced by numerous groups interested in the insurance crisis and tort reform, and such information was carefully reviewed during the drafting of the report. Independent of the drafting of the report, a number of officials in the Administration have met with state representatives regarding the insurance crisis and tort reform, including representatives of the National Governors Association, the National Association of the Attorneys General, and other organizations representing state officials and legislators.

It should be noted in this regard that the report of the Tort Policy Working Group was intended for the internal policy deliberations of the Administration. Accordingly, it was felt to be inappropriate to release the report in draft to groups outside of the Administration for review and comment. The report was ultimately released to the public to explain the basis of the Administration's policy decisions with regard to both the crisis in insurance availability and affordability as well as tort reform. It should be emphasized, however, that the views of State and local officials on these matters are well known to the Administration, and were carefully taken into account in both the drafting of the report and in the formulation of the civil justice reform legislation which the Administration has sent to the Congress.

Q.#5. I understand that the President has endorsed in full the recommendations of the Tort Reform Task Force and intends to submit legislation to the Congress which would encompass those proposals. Those recommendations include curtailment of the use of joint and several liability in negligence cases, strict limitations on the award of damages for pain and suffering and punitive damages and a return to so-called fault based liability, rather than the rule of strict liability which [has] been so broadly applied against manufacturers of defective products. You have also sent to the Congress antitrust reform legislation, which among other things, recommends the elimination of treble damages in anything other than the most obvious price-fixing cases. I understand that the Justice Department is also soon going to recommend the virtual elimination of civil RICO, by endorsing legislation which would require a prior criminal conviction.

So let me ask you, how do you propose to hold large institutions, primarily corporations, accountable when they engage in wrongdoing? Aren't all these recommendations headed in the same direction -- i.e., eliminating corporate accountability?

A.#5. With respect to our proposed reforms in tort law, the crisis in liability is hurting small businesses and individuals just as much, and probably more so, as larger businesses. The providers of useful and even vital services and products are being unjustly threatened with legal disaster regardless of their size. Consequently, many of the smaller enterprises are going out of business. The consequences for the quality of life in America are troubling.

Nothing in the proposed reforms reduces the accountability of corporations for their wrongdoing. The reforms we propose are designed to hold corporations, as well as small businesses and individuals, responsible for injuries or damages that were their fault. By the same token, our reforms are intended to absolve innocent individuals of liability for the acts of others or for injuries that were not their fault. Our reforms embrace the doctrine of strict liability as a fault based concept responsive

to modern industrial life. We simply oppose absolute liability regardless of fault which has been the recent drift of tort law. In this regard, it may be worth noting the following statement from the Tort Policy Working Group's report:

> Strict product liability in its traditional sense represents a sensible application of fault-based liability to the realities of modern industrial life. The Working Group, accordingly, does not recommend the abolition of strict product liability, provided the doctrine is kept within its traditional bounds. Unfortunately, strict product liability has been subject to extensive abuse that often has had the effect of transforming the doctrine in practice into absolute liability. (page 61)

I should mention that because the Administration is committed to holding corporations accountable for wrongful actions, it has proposed sweeping legislation--now before your Committee-- designed to combat waste, fraud and abuse. This legislation would update antiquated laws and close loopholes in the laws that now allow individuals to defraud the government.

With regard to the individual citizen's right to sue a corporation, small business, or individual, for wrongdoing committed against that citizen, the reforms we propose will in many ways enhance their ability to deter wrongdoing.

While the Department supports reform of civil RICO law because of unintended and widespread abuse of its provisions, we strongly support the use of Criminal RICO actions against criminal business practices.

I must also note that in addition to the items which you mention, there is available for controlling corporate wrongdoing a panoply of regulatory remedies and penalties, as well as the deterrent of injunctive relief.

The reforms we propose will allow the tort system to return to an efficient and fair means of obtaining reasonable compensation for injuries while deterring wrongful conduct. The present system-- where individuals may be found liable when they did nothing wrong, or did not sell an unreasonably dangerous or defective product, or where they engaged in reasonable (even socially beneficial) conduct--does nothing to encourage responsible behavior. In fact, an irony of the current system is that it serves as a disincentive toward safer or more reasonable conduct because the law has evolved to the point where no matter how reasonable or safe one's conduct or product, there is a very real threat of ruinous liability.

Q.#6. Joint and several liability, treble damages in antitrust and RICO and punitive damages all share something in common -- they are major deterrents to wrongdoing. A business knows that there will be a very high price to pay if they deliberately manufacture a defective product that harms people or engage in fraud or conduct which has a negative impact on competition. If you eliminate these deterrents, or severely limit their application, what will replace them? How do you suppose business will be motivated to do what is right? What will be the sanction if they do something wrong?

A.#6. As we stated in answer to the above question, the reforms proposed by the Tort Policy Working Group are aimed at deterring corporate and individual wrongdoing and promoting reasonable compensation. Liability should be proportional to wrongful conduct and to the wrong done. The current imbalance does violence to both of these principles. This Administration looks forward to enacting sensible reforms of our civil justice system--through tort reform and stronger fraud legislation--that will hold wrongdoers responsible, allow everyone a fair and equitable system in which to settle disputes, and restore meaningful accountability in a way that enhances, not disrupts, the quality of American life.

Overall Management of the Department of Justice

Question #1: Mr. Meese, the General Accounting Office recently completed a report entitled "Improved Management Processes Would Enhance Justice's Operations." In response to that report it cites your efforts to improve overall management by creating a Department Resources Board to emphasize long range planning and policy development.

Can you tell us what recommendations have come from this Department Resources Board and how you are attempting to improve long range planning and budget formulation at the Justice Department?

Answer: The basic sets of recommendations made by the Department Resources Board (DRB), on a recurring basis, deal with resource issues in the Department of Justice. Their recommendations, however, are made to me in the context of resources needed to achieve Presidential and Attorney General policy goals for the federal justice system. Further, the DRB's resource recommendations are made to me only after their thorough review of the proper programming of current or new resources. This latter function is a crucial one in that we have limited resources to work with and we want those resources to be placed in those programs which are most likely to deliver the best and most effective results given the resource investment.

The DRB has also focused, to a greater degree than did the former Budget Review Committee, on the execution of the Department of Justice's operating year budget. I expect this DRB role to expand in succeeding fiscal years.

In the area of longer range planning, the DRB is working with major Department organizations to review resource needs over a longer time boundary than the upcoming budget year. We are reviewing costs associated with both base programs and new initiatives in the context of the budget year plus four years. The DRB's recommendations to me must focus on the longer term implications of programming and resource choices made in the current year.

The DRB is functioning in a critical longer term planning role relative to major automatic data processing (ADP) and telecommunications systems planned or being implemented in the Department of Justice. The Deputy Attorney General, who is the

Chairman of the DEA, in leading our long-term planning and implementation efforts as a Customs Office Automation and Department Case Management project. This project oversees the Department's six legal divisions and the U.S. Attorneys. Based on the experience gained from this project, we expect it to expand to the general administration area of the Department and to other Department organizations.

The DEA is also functioning in a major role by assisting me with the development and implementation of a five-year management and productivity improvement plan. I view this effort as critical to making the most efficient use of our base funding and staffing resources. In this context, the DEA makes recommendations to me on the best organizational structure of the Department to responsibly and where potential duplication of effort exists and how best to combine those inefficient areas of current responsibility.

The efforts identified above represent some of the ways the DEA is assisting me, through its recommendations, in improving long-range planning and budget formulation in the Department of Justice. I hope to have institutionalized, for the end of my term in office, a mechanism whereby the future Attorneys General to come in their long-range planning and resource decision making activities to the Federal justice system and the Department of Justice.

Question #2

A key recommendation in this report was the establishment of an Inspector General for the Department of Justice. GAO believes that Justice's audit and investigative unit[s] do not have the independence permanence [sic] to effectively and efficiently perform their work of ensuring the Attorney General and the Congress of any serious problems. Why are you opposed to the idea?

When the Inspector General Act was enacted in 1978, Congress intentionally did not provide for the establishment of an Inspector General at the Department of Justice. Since enactment, the Department has studied and reviewed several proposals which would have created a statutory Inspector General in the Department. This review has reinforced our conclusion that it would be counterproductive to establish a Department of Justice Inspector General.

A fundamental principle underlying our conclusion is the need to maintain the authority of the Attorney General as the nation's chief law enforcement officer. The Office of the Attorney General is the final and ultimate repository of prosecutorial power. The powers of investigation, indictment and prosecution are of far greater breadth than the proper responsibilities of any Inspector General. The responsibilities of the Attorney General--to investigate and to prosecute or institute litigation when necessary to uphold Federal law--require that broad-based discretion be entrusted to the Attorney General. These elements constitute an important underpinning of the effective enforcement of the law. Under present law, one individual, the Attorney General, is responsible and accountable for carrying out these functions.

The distortion and diffusion of the Attorney General's responsibilities caused by the establishment of an Inspector General would be direct and significant. An Inspector General would have statutory authority to interfere with any ongoing investigation being conducted by the FBI, DEA or INS, as well as decisions made by the various Assistant Attorneys General in charge of the litigation divisions. The obligation to provide policy direction for investigations and the overall responsibility for the conduct of investigative activities currently rest with the Attorney General. An Inspector General will distort this responsibility and necessarily lessen and interfere with the Attorney General's accountability.

The reporting requirements of the Inspector General Act of 1978 are also inconsistent with the Department's obligations and duties. The reports that are mandated do not address the need to protect from disclosure ongoing investigations, confidential sources, classified information, litigation material and other sensitive information. The Act's reporting requirement substantially increases the risk that information will be compromised.

In addition, establishing an Inspector General for the Department ignores the effective mechanism established within the

Department to investigate allegations of impropriety and to carry out extensive audit capabilities. Since its inception prior to enactment of the Inspector General Act, the Office of Professional Responsibility (OPR) has had the duty to monitor the integrity and professionalism of the Department's personnel. The Counsel to OPR is accountable to the Attorney General. He has complete freedom to determine the scope, depth, direction and duration of the office's investigations. During OPR's existence, no one has challenged the thoroughness and integrity of the manner in which it has carried out its responsibilities.

Similarly, the Department's Audit Staff has the authority to conduct and coordinate effectively audit efforts within the Department. In terms of its independence, the Audit Staff carries out its responsibilities under the direction of the Assistant Attorney General for Administration, who reports to the Deputy Attorney General. For audits of programs and activities of the Justice Management Division, which the Assistant Attorney General for Administration heads, the Audit Staff reports directly to the Attorney General and Deputy Attorney General. A broader mandate would be difficult to conceive. The history of OPR and the Audit Staff demonstrates that the Department has instituted comprehensive, coordinated, independent and effective mechanisms to deal with financial and professional misconduct.

For these reasons, we would oppose any legislation that would establish an Inspector General for the Department of Justice.

○